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THE LAW OF WILLS.

Embracing also the Jurisprudence of Insanity, the Effect of Extrinsic Evidence, the Creation and Construction of Trusts, so far as applicable to Wills. With Forms and Directions for preparing Wills. By ISAAC REDFIELD, LL. D.

THIS work, from the pen of a gentleman so generally and so favorably known as a jurist and a legal writer, cannot fail to be welcomed by the profession, and all persons interested in the subjects of which it treats. Some of its chapters may be read with interest by other than professional students, and are worthy of a careful study for other purposes than to be used in court. Nor can the work, as a whole, be long in finding a place upon the shelves of every lawyer who aims at anything like a good working library. Though the volume is complete in itself, there are so many topics which are necessarily omitted in what it contains, that the second, which is promised, will be looked for with interest, to supply a want which has long been felt in the legal literature of the country.

This or the coming volume may not wholly supersede or supply the place of Jarmyn, with the admirable additions by the editor, Mr. Perkins, but we have no hesitation in affirming that no other work which we now have can supply the place of the one before us.

In the first place, it is a practical work, treating of matters which arise in the business of making, construing, and executing wills, with little in it of speculation, and nothing of the useless and obsolete. In the next place, it has been prepared by one

who has seen the working of what he has written about, in every form and phase it could well assume; and not a little of what he has had occasion to state in this treatise, had been fully considered and applied by him in another capacity, in giving those judgments which helped to elevate and sustain the character of the court of which he was so many years the head.

The work, moreover, is his own—no compend of the labors of others—elaborated, with great care and caution, whereby the reader gets the fruits of the author's own thoughts and reflection, as well as of his industry and research. Every lawyer knows the difference there is between the well-digested, orderly-arranged thoughts of a writer upon legal subjects who is competent to weigh, analyse, and balance the propositions which he finds in the volumes from which he gathers his materials, and a mere digest, however faithfully made, where one proposition is just as prominently presented as another, though not to be reconciled with each other; and the reader, in the end, gets little more than an enlarged index to the mass of matter which loads the shelves of any considerable law library. We deem this trait in the present work a most decided ground upon which to commend it. There is no shrinking on the part of the author from grappling with every matter as it comes up; and whether the reader agrees with him in all his positions or not, he knows what those positions are, and is not turned off with the dictum of one judge upon the top of a page, and a contrary dictum of some other court upon another part of the same page. Cases are cited and liberal quotations are made from the opinions of judges, but there are no marks of the scissors that we have perceived on any page of the volume. The author does not go out of his way to discuss foreign matters, nor, on the other hand, does he *dodge* anything which properly comes in his way, merely because it is not easy to reduce it to form and symmetry with what is familiar and easily understood. When we add, that, in what he does say, the author makes use of plain terms and a clear and unpretentious style, we have said all which our space will allow of the general character of the work, and the impression which it has made upon our own mind.

If now we speak more particularly of the topics and arrangement of parts of the work, we find it covering near eight hundred pages, divided into thirteen chapters, and these subdivided into sections and paragraphs, numbered, so that the several topics, with their several clauses and propositions, are distinctly marked and orderly classified. The contents of the entire work, by

chapters and sections, are given in the opening pages of the volume, and a careful index completes the facility which is afforded to any one wishing to investigate any of the subjects of which it treats.

We do not propose to speak of these in detail, since our space would not admit of it; nor could it be profitable, from the necessary brevity with which it must be done. But there are two or three points which we would not wholly omit, while we regret that we can say so little. Section 3 treats of wills by married women, in which the laws of the several States upon this subject are given, as well as the rules derived from the civil law, between which and the common law, as is well known, there has been an irreconcilable discrepancy upon the legal capacity of women under coverture.

In the fourth section he discusses and examines the conflicting opinions of different courts in this country and England upon the question of the *burden of proof*, in establishing the sanity of a testator when executing his will. With a part of these courts, every man, whether making his deed or his will, is presumed to be sane, and they do not therefore require the party seeking to establish the instrument to do anything more than call the attesting witnesses, and proving by them the act of executing the will, leaving the adverse party to raise the question of sanity, if he would impeach it on that ground. Those who take the other view of the law, among which is the Court of Massachusetts, consider the testator's sanity essential to be proved affirmatively, before they will allow the heir to be disinherited by a testamentary paper. The author evidently favors the former opinion, while he presents the argument and the authorities upon each side with candid discrimination; though we confess to the force—it may be from early impressions—of the views entertained by the Courts of Massachusetts, and of DAVIES J. of the New York Court of Appeals, in the famous Parish Will Case.

Of the testimony of "*experts*," as they are technically called, it is positively refreshing to read what the author says in the thirteenth and fifteenth sections of the work. He must have the sympathy of every lawyer who has had the fortune to examine a witness whose *expertness* has seemed to consist in the adroitness with which he draws favorable conclusions for the side which employs him, from the facts which make most strongly against the *theory* which he is called to sustain. Nor is this any less true of the testimony by which the sanity of a testator is assailed or sought to be sustained. And while, for the opinions of com-

petent medical witnesses, which are found after a candid examination and comparison of facts, such as we have often heard in court, we cannot speak with too much respect, we confess the opinion of a mere theorizer, of which, too often, the wish of the employer is the key-note, does not derive any great weight from his having been dubbed "doctor" by the counsel who draws it out. Nor, with all respect be it spoken, can we fully subscribe to the traditional rule which the Court of Massachusetts has declared, that the opinions of physicians, who may be educated and in practice in curing diseases of people's bodies, should be taken as evidence upon which a jury might form a judgment of the sanity of a testator's mind, even though, as in the case decided, he "had, at times, been his medical adviser." The genus "physician," in this land of ours, is pretty broad and comprehensive; and we apprehend that among them there must be not a few who know far less of the laws of the human mind than hosts of shrewd, intelligent men, who have made human nature and diversity of character their study, in the every day walks of their business.

One suggestion of the author must meet the hearty approbation of every one familiar with our courts. If experts are to be examined, and there are cases where this is certainly necessary, let the court select them, and then let them be paid. The idea of calling in men eminent for skill and science, to give opinions, at the rate of a witness's fee of two dollars a day, upon matters which it has cost a life to master and understand, is simply absurd, and not to be tolerated. And it seems now to be understood, that a man is not to be compelled to come into court upon a subpœna, to testify to opinions upon matters of science or skill; though a man of science, like any other witness, may be required to testify to facts within his knowledge.

In this connection, we would speak of the manner in which the entire subject of mental capacity of a testator is treated in this work. It is most admirable and complete. We know nothing in any purely legal treatise so full and satisfactory. Everybody who has ever tried the question of a contested will, knows how distressingly vague and unsatisfactory have been the rules laid down in the books to guide him in his investigations. Beyond the criterion of *delusion*, laid down so clearly and pressed so successfully by Mr. Erskine in Hadfield's case, there was little but speculation and general statement. Who would now think of applying the rules laid down by Coke upon the subject, to test the sanity of a testator? And even to this day, the subject, from its very nature, is and always will be

uncertain and unsatisfactory, whenever any general rules are sought to be adopted as a guide. The work before us by no means steers clear of this difficulty, for the very reason that it is one that is intrinsically inherent in the subject; but we think it goes farther in supplying the desired clue in these investigations, than any other book that has fallen under our observation. The Author is obliged, of course, to refer to the works of Taylor, Ray, and others, who have made mental diseases a specialty; and, with the utmost skill and observation in detecting appearances which we may incline to concede to them, the facts upon which they attempt to generalize are necessarily too few to raise their deductions much above the character of hypotheses. Whoever studies the sections of this work from the eighth to the sixteenth, will appreciate the truth of these remarks, and will be sensible of what they owe to the diligence and discriminating good sense of the author.

As we have already transcended our limits, we can only notice one or two other topics in the briefest manner. Under the head of *subscription and attestation by witnesses*, he has settled a question which has sometimes been agitated in the courts,—that such an attestation would be good, though the will have no "testimonium clause," and though the persons signing as witnesses are nowhere named as such; and that it makes no difference upon what part of the paper, containing the will, the signatures of the witnesses appear.

Another subject which he elucidates is the extent to which papers, not forming a part of the body of a will itself, may be made to have the same effect, by reference, as if copied into it. This, of course, must apply only to papers then in existence, and does not extend to such as are written after the execution of the will.

Somewhat related to this, though treated of under a different head, is the question that has arisen, at times, as to the effect of a devise to one named, for the benefit of some one who is not named in the will, though perhaps indicated orally by the testator. This opens the question of testamentary *powers* and *trusts*, which we hope to see treated of in the next volume, and therefore forbear dwelling even upon what is found upon the subject in the forty-second and forty-third sections of the present publication.

We had intended to speak of *nuncupative wills*, the hearing of which is so rarely called into use; but must content ourselves with stating an inquiry which was submitted to us, a few days since, by a lawyer practising in the Supreme Court of

Liberia, where there is no existing statute upon the subject of wills, "Whether a nuncupative will, devising real estate, is good at common law?" The question is now pending before that court, and we are confident we could give no better advice to the lawyers of Liberia, as well as to the lawyers of our own country, than that they should buy and study Redfield on Wills.

FORECLOSURE OF MORTGAGES IN MASSACHUSETTS.

THE subject of the foreclosure of mortgages is one regarding which questions, often involving valuable interests, are daily arising. Having recently had occasion to investigate this subject, we give the results of our examination of the statutes and reports, as relating to the nature of the entry and possession requisite in Massachusetts to effect such foreclosure, hoping that thereby we may do some service to the legal profession.

The provisions of the Massachusetts Statutes appear, at first sight, to require of the mortgagee, in order to foreclosure, an open and peaceable entry upon the mortgaged premises, followed by an actual possession continued during three years; but upon reference to the Reports, we shall find, especially if we take into consideration the dicta as well as the points decided, that our Supreme Court has interpreted the statutes as requiring in effect only a formal entry by the mortgagee, followed by the mere lapse of three years, uninterrupted by a suit for redemption, or the payment or tender of the amount due. Such seems also to be the general idea of the requisites to foreclosure, both within and outside of the profession; but it can, we think, be shown, that such a view of the law is not a safe one to act upon. In order to present, as fully as possible, the present state of the law in Massachusetts upon this subject, we propose to give a review of the different statutes and decided cases bearing upon it.

The first statute was passed in 1698.[1] This, as explained by a later statute, passed in 1712,[2] provides that where the mortgagee "*shall be in actual possession*," the mortgagor may bring his suit to redeem within three years from the time of the mortgagee's entry and taking possession. The next statute[3] was

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[1] Province Laws of Mass. ch. 58, § 4.
[2] Province Laws of Mass. ch. 108, § 2.
[3] Stat. Mass. 1785, c. 22.

passed November 4, 1785. It provides that mortgaged estates "shall be redeemable," "unless the mortgagee or person claiming under him hath, by process of law, or by open and peaceable entry, made in the presence of two witnesses, taken *actual possession* thereof, and continued *that possession* peaceably three years." This statute was followed by one passed March 1 1799, and entitled, "An Act in addition to" the preceding. This last named statute[1] does not repeal the earlier one, nor does it appear to have been intended as a substitute for it. It provides that when any mortgagee "shall lawfully enter and obtain the actual possession" of the mortgaged premises, the mortgagor "shall have right to redeem the same at any time within three years next after such possession obtained, and not afterwards," and then proceeds to provide further for a tender to the mortgagee "in possession as aforesaid." The provision of the Revised Statutes,[2] which is next in order of time, reads as follows:—"After the breach of the condition of a mortgage of real estate, the mortgagee may recover possession of the mortgaged premises by action in the manner hereinafter provided; or he may make an open and peaceable entry thereon, if not opposed by the mortgagor or other person claiming the premises; and such possession, obtained in either mode, being continued peaceably for three years, shall forever foreclose the right of redemption." The report of the Commissioners who prepared the Revised Statutes, gives the section in the form in which it was finally passed; it refers to the above-cited Stat. 1785, c. 22, as the statute upon which the section is founded, and nothing is said by them, nor is there anything to indicate an intention on their part to alter, by any change of the phraseology, the law as to foreclosure, from what it had been under the statute of 1785. The present provision of the General Statutes[3] is exactly the same as that of the Revised Statutes, with the exception of the immaterial omission of the word "the" before "condition," and of the word "being" before "continued."

Whatever questions might be raised upon the construction of the provisions of the Revised or of the General Statutes, it would seem that the language of the earlier statutes plainly requires *actual possession during the three years;* and such appears to have been the view taken by the Supreme Court, in the recent case of *Swift* v. *Mendell.*[4] Judge Shaw, in giving the decision in

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[1] Stat. Mass. 1798, c. 77.
[2] Rev. Stat. c. 107, § 1.
[3] Gen. Stat. c. 140, § 1.
[4] 8 Cush. 357.

this case, says that if the estate was foreclosed, "it was by force and effect of an entry made by the mortgagee on the mortgaged premises, on the 23d November, 1830, and it must be determined by the law as it stood before the Revised Satutes, Stat. 1785, c. 22, modified by Stat. 1798, c. 77. It must be done by making open and peaceable entry, taking actual possession, and continuing such possession three years." The facts in the case were, that the mortgagor, having signed a certificate acknowledging the entry and actual possession of the mortgagee, continued to reside upon the estate without the payment of any rent; and the only question was, whether this was consistent with a *continued actual possession* by the mortgagee. The court say—"Whether the mortgagor paid rent or not, is immaterial; as the facts stand, the mortgagor was tenant at will of the mortgagee; and then the maxim applies that the possession of the tenant is the possession of the owner. The only question that could arise is upon the term *actual possession*. But we think it was used in contradistinction to the case of the mortgagor, or some other person claiming to hold and actually holding the possession adversely, and not admitting the possession of the mortgagee; but a mortgagor, *having consented to hold under the mortgagee, as his tenant, holds the possession for him and makes the possession his possession.*"

To the law, as laid down in the above case, no valid objection can be taken; it requires actual possession during the three years, but, in accordance with well-known principles, it allows, as equally valid with a personal possession by the mortgagee; a possession by his agent or tenant, even though such agent or tenant be the mortgagor himself. And if to the principles determined by this decision, we add the further one established in the case of *Bennett* v. *Conant*,[1] namely, that "after the mortgagee has rightfully entered and held sometime, the burden of proof is on the party questioning the continuance of such possession, to prove some interruption," we shall have a state of the law clear and intelligible, and not inconsistent with the apparent meaning of the statutes.

Our Supreme Court, however, has not stopped here, but has, in several cases to which we shall refer, taken positions, the validity of which is more questionable.

Thus it has decided that a mortgagee of a reversion may effect a valid foreclosure against the mortgagor, though the tenant for life is living, and remains in possession,[2]—that a second

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[1] 10 Cush. 163.

[2] Penniman *v.* Hollis, 13 Mass. 429; Doyle *v.* Coburn, 6 Allen, 71.

mortgagee may likewise effect a foreclosure, while a first mortgagee is in possession for the same purpose,[1]—and that the entry and continued actual possession of a first mortgagee, who ejects a second mortgagee who is in for the purpose of foreclosure, will not prevent the foreclosure of the second mortgage from proceeding as against the mortgagor and third or subsequent mortgagees.[2] In these cases the possession of the mortgagee upon which the foreclosure proceeds, is evidently the merest fiction of the law, the parties having the actual possession not in any way consenting to his entry, and having rights adverse to his, and therefore being by no means liable to be called his agents or tenants. Still as against the mortgagor and those claiming under him, who would seem to have no good ground for complaint, this may perhaps be considered a good constructive possession, though at the same time it seems questionable whether the court do not too far disregard the language of the statutes in substituting for that possession, which in the statutes in force when the first two cases arose, was expressly required to be *actual*, a constructive possession which had *no actual existence*.

But the court have assumed another position upon this subject of foreclosure, which is open to still more serious question. Having decided, as shown above, that persons claiming adversely to the mortgagor, cannot prevent the statute three years from commencing and continuing to run, they next decide that, on the other hand, when an entry is once made, the mortgagor and those claiming under him by title inferior to that of the mortgagee, are equally powerless to prevent the foreclosure. This is effected by the doctrine that "a mortgagor, especially after entry, cannot disseize the mortgagee, or defeat his right of possession."[3]

The law, then, as laid down by our Supreme Court, would seem to be reduced to this,—that a mortgagee, after having once entered, and without further act or trouble on his part, is, unless he waives his own rights, sure of his foreclosure as against the mortgagor, and all claiming under him by titles inferior to his own,—that all that is required of a mortgagee, is that he should simply make a formal entry, and then wait for the three years to run out,—for the mortgagee's possession endures constructively, in spite of all acts or ejectments by prior

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[1] Walcutt *v.* Spencer, 14 Mass. 409; Cronin *v.* Hazletine, 3 Allen, 324.
[2] Palmer *v.* Fowley, 5 Gray, 545.
[3] Lennon *v.* Porter, 5 Gray, 318, 320.

mortgagees, or by parties claiming independently of the mortgagor, while the mortgagor himself, and those claiming under him, are cut off from interfering by a dogma which interprets all their acts, however hostile, as no disseizin. The statute, then, so far as it provides for a *continued possession*, becomes a dead letter,—it should have simply stated an entry followed by the lapse of three years to be sufficient for foreclosure.

But this doctrine of the impossibility of a disseizin of a mortgagee by a mortgagor, appears to have been founded in some evident mistakes and misapprehensions. In the first place, the case of *Hunt* v. *Hunt*,[1] which is referred to in *Lennon* v. *Porter*, as supporting the position then taken, plainly falls far short of so doing. In the former case, although the head note is—"A mortgagee cannot be disseized by a mortgagor," the question at issue was merely whether improvements or erections made upon the estate by the mortgagor, *before* entry by the mortgagee, could be deemed a disseizin,—a question upon which it would seem there could be no room for doubt. The court, indeed, in deciding this question, say, in general terms—"It is very clear that a mortgagee cannot be disseized by the mortgagor; being tenant at will, his possession is not adverse." This statement of a principle, though unexceptionable, when confined to cases such as that then before the court,—to cases where the mortgagor remains in possession before the entry to foreclose,[2]—assumes a new aspect in cases where, as in *Lennon* v. *Porter*, the mortgagor does acts of ownership *after* the entry and possession of the mortgagee, and without his knowledge or consent. Then the reason given above, "that the mortgagor is a tenant at will of the mortgagee, and his possession therefore not adverse," no longer applies, for his tenancy at will has then been terminated by the entry, and any renewed possession which he may take, without the consent of the mortgagee, is clearly adverse. The doctrine that a lessee cannot disseize his lessor, only applies during the continuance of the lessee's term,—it cannot be supposed that a party, because he has once been the lessee of another, is forever incapacitated from disseizing him. Judge Wilde, in *Tyler* v. *Hammond*,[3] says—"It is quite clear that a lessee cannot, *during the continuance of his term*, disseize the lessor of the land demised, but the reason is,

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[1] 17 Pick. 118, 121.

[2] But as to these cases even, see Howland *v.* Shurtleff, 2 Met. 26.

[3] 11 Pick. 193, 215. See to the same effect, Ayres *v.* Waite, 10 Cush. 71, 79.

not because he cannot dispute the lessor's title, but because by the lease he is entitled to exclusive possession, so that he can do no act which can by possibility amount to a disseizin." And in the very case in which this statement of the law was made, it was held that when this reason failed, as when a party was tenant only of an easement, and took possession of the whole estate, a disseizin of the landlord by the tenant was effected. Thus we see that the foundation on which a mortgagor's disability to disseize his mortgagee is based,—and it seems the only possible foundation for such a rule,—is the rule that a tenant cannot disseize his landlord, the mortgagor being held to be, under certain circumstances, a tenant at will of the mortgagee, but that, as this principle applies only to a tenant during the existence of his tenancy, the disability of the mortgagor to disseize his mortgagee should consequently be confined to those cases where he may be considered his tenant at will, thereby excluding such cases as *Lennon* v. *Porter*, above cited.

But even as thus limited, this principle of the inability of the tenant to disseize his landlord has, at least in its strict sense, been abandoned by the Supreme Court of the United States. It seems to be now held, and apparently with good reason, that, though in general the acts of a tenant are not to be construed as a disseizin of his landlord, yet, when they are open, continued and notorious, such as to preclude all doubt as to the character of the holding, or as to want of knowledge on the part of the landlord, such acts so done may amount to a disseizin;—the distinction between cases of tenants, and those where no privity exists between the parties. being in the degree of proof required to establish the adverse character of the possession. In the former class of cases, as the possession "was originally taken and held in subserviency to the title of the real owner, a clear, positive and continued disclaimer and disavowal of the title and assertion of an adverse right, and to be brought home to the party, are indispensable." "Otherwise the grossest injustice might be practised; for, without such notice, he might well rely upon the fiduciary relations under which the possession was originally taken and held, and upon the subordinate character of the possession as the legal result of those relations."[1]

Thus every step of the reasoning which leads to the decision in *Lennon* v. *Porter*, appears to be weak and unreliable, and both reason and the authorities force us to the conclusion that a

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[1] Willison *v.* Watkins, 3 Peters, 43, 47; Zeller's Lessee *v.* Eckert, 4 Howard, 289, 295. See also Lefavour *v.* Homan, 3 Allen, 554.

mortgagor may disseize his mortgagee in possession after entry, and consequently that the statute three years *may* be interrupted by the act of the mortgagor. It may be said that this conclusion would, if established as law, be productive of much inconvenience, as it would render it easy for a mortgagor to prevent a foreclosure of his estate; but whether inconvenient or not, it seems to be the plain result of the statute, and it is the fault of the legislature that they have made, as no one can doubt their power and aptness for doing, an inconvenient statute provision.

The conclusions at which we arrive, seem, then, to be these,—that the general rule is that in order to foreclosure, a mortgagee must enter and continue in possession of the mortgaged premises either himself or by his agent or tenant for three years;—that in the absence of proof of any fact tending to show the contrary, an entry will be presumed to have been followed by the required possession;—that the mortgagor may himself be such tenant, with or without the payment of rent,—that when the mortgagor acknowledges the entry, that fact alone is sufficient to constitute him the tenant of the mortgagee, and his continued possession the possession of the mortgagee;—that when the mortgagor does not, by an acknowledgment of entry, or by some other act, make himself the tenant of the mortgagee, he may, by his own acts, effect a disseizin of the mortgagee, and interrupt the statute three years;—that to the general rule above stated, there are the following exceptions;—that when a prior mortgagee is in possession, a subsequent mortgagee may foreclose against the mortgagor and mortgagees whose titles are inferior to his own, by a formal entry, followed by a *constructive* possession of three years, such constructive possession requiring no act of *actual* possession;—that, when a subsequent mortgagee has once entered and commenced an actual possession, the entry and taking from him of the actual possession by a prior mortgagee before his three years have expired, will not prevent his time of foreclosure from continuing to run, his *actual* possession being changed for the remainder of the three years to a *constructive* one;—and that when the mortgage is of a reversion, a constructive possession during the continuance of the particular estate is equally valid, as in the two preceding instances.[1]

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[1] With regard to the three exceptions above mentioned, it may be remarked, in addition to what has been already said, that they depend entirely upon the three cases of Penniman *v.* Hollis, Palmer *v.* Fowley, and Cronin *v.* Hazletine, together with dicta, more or less distinct, in Walcutt *v.* Spencer, and in Ami-

RECENT AMERICAN DECISIONS.

Circuit Court of the United States.

District of Massachusetts.—October Term.

WILLIAM R. CLARK *v.* CHARLES H. PEASLEE.

Foreign goods deposited in a private bonded warehouse, under the laws of the United States, and regulations of the Treasury Department, are subject to the charge of half storage.

The laws of the United States, and Treasury regulations in relation to warehousing dutiable goods, examined and considered.

The facts are fully given in the opinion of

CLIFFORD J.—This was an action of assumpsit brought by the plaintiffs to recover back the amount of certain duties on imports previously paid by them under protest, and which, they allege, were illegally exacted of them by the defendant, as the collector of the port of Boston. Goods, consisting chiefly of fish and oil, were imported by the plaintiffs, and were by them duly entered for warehousing. One of the entries was made on the twenty-third day of January, 1855, as appears by the evidence in the case. Application in writing was made by the

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down *v.* Peck, 11 Met. 467. If the first named case, that of the mortgage of a reversion, is distinguished from the others, on the ground that the constructive possession is there excused by the fact that the mortgagor has never had and has never been entitled to any actual possession of the estate, and that the mortgagee has taken all the possession that the mortgagor ever had or could have of the thing mortgaged, which is not properly the estate itself, but the reversionary interest in the estate, we have left the two cases of Palmer *v.* Fowley, and Cronin *v.* Hazletine, standing alone; but the credit of the latter case must be greatly shaken, by the fact that its decision was based upon that of the former, which was erroneously assumed to have been almost exactly analogous to it, Judge Dewey, in his opinion, stating that case according to its head note, which, however, in fact entirely misstates the point decided. Palmer *v.* Fowley, on the other hand, is founded on the case of the mortgage of the reversion, which, for the reason stated above, would seem to stand upon a different footing, and to rest upon principles which would not require the decision in Palmer *v.* Fowley. Under these circumstances, is it not possible that upon a review of the whole subject, the court might reverse the decision in Palmer *v.* Fowley, and in Cronin *v.* Hazletine, and hold in accordance with the apparent requirements of the statute, that if a second mortgagee would foreclose while a first mortgagee is in possession, he must first pay off such first mortgagee, and then enter and take the actual possession himself?

plaintiffs to the defendant, as collector of the customs, for leave to warehouse the importation in their own store, which was granted, and on withdrawing the same for consumption, they paid twenty-five dollars and twenty cents as half storage, in addition to the regular duties. Various other entries were made by them of similar goods, and in all the cases similar exactions were made of them, and were by them paid, under protest. All of the entries were made under the acts of Congress concerning the warehousing of imported goods, and the half storage was claimed by the defendant under those laws, and the regulations of the Treasury Department. Suit was commenced on the first day of April, 1859, and the declaration, as amended, embraced sums so paid by the plaintiffs from the thirty-first day of March, 1854, to the fourteenth day of August, of the following year. Defendant pleaded that he never promised, and at the October term, 1860, the parties went to trial on that issue. Testimony was introduced by both parties, and verdict was taken in favor of the plaintiffs for the sum of eighteen hundred and thirteen dollars and thirty-five cents, subject to the opinion of the court, upon questions of law, and with authority to amend the verdict, or to enter a general verdict for the defendant. Sufficient has already been remarked to show that the main question in this case is, whether the charge of half storage was a proper one to be made, under the circumstances disclosed at the trial. It is insisted by the plaintiffs that the charge was unauthorized and illegal, and consequently that the verdict is right. On the other hand, it is insisted by the defendant that the charge was a legal and proper one, and consequently that the whole claim of the plaintiffs is invalid, and without foundation. Amount is the only matter to be adjusted, if the plaintiffs are right; but if they are wrong, then the verdict must be set aside, and judgment entered for the defendant. Considering the nature of the question, it is evident that it cannot be satisfactorily solved without a careful review of the acts of Congress concerning the warehousing of imported goods, and of the principal regulations and circulars of the Treasury Department upon the same subject.

Warehousing, as a system, was established in the United States by the act of sixth of August, 1846. 9 Stat. at Large, 53. Among other things, the first section provides, that upon the failure or neglect to pay the duties within the period allowed by law, or whenever a warehouse entry shall be made in the prescribed form, the importation "shall be taken possession of by the collector," and be deposited in "the public stores or in

other stores," to be agreed on by the collector and the importer, owner, or consignee; and by the same section, such stores are required to be secured in the manner provided for by the first section of the act of the twentieth of April, 1818, entitled "An Act providing for the deposit of wines and distilled spirits in public warehouse." Such goods are not only required to go into the possession of the collector, and be thus deposited under his control, but they are also required to be kept in the place of deposit at the charge and risk of the owner, importer, or consignee. Goods so deposited are at all times subject to the order of the owner, importer, or consignee, upon payment of the proper duties and expenses; but those are required to be secured by a bond to the satisfaction of the collector, in double the amount of the duties. Duties upon such goods are required to be paid within a prescribed period; and in case the goods remained in public store beyond that time, without payment of the duties and charges thereon, they were to be appraised and sold by the collector at public auction, and the proceeds, after deducting the usual rate of storage at the port, with all other charges and expenses, including duties, were to be paid to the owner, importer, or consignee. Whether the merchandise is deposited in the public stores, or in the other stores therein described, there is not one of the provisions here referred to which does not assume that the goods are in the possession and under the control of the collector; and whether deposited in a public or private warehouse, it is clear that the goods cannot be withdrawn for consumption without the payment of the duties; nor for transportation or exportation, except by paying *the appropriate expenses*. Most of the provisions of the act are general in their phraseology, and doubtless were made so, because the system was new and untried in this country; and they were necessarily framed and passed without the light of experience. Details, for the most part, were apparently avoided, but the fifth section authorized the Secretary of the Treasury, from time to time, to make such regulations, not inconsistent with the laws of the United States, as might be necessary to give full effect to the provisions of the act, and secure a just accountability under the same. By virtue of the authority conferred under that provision, the Secretary of the Treasury, on the seventeenth day of February, 1849, promulgated an extended circular of instructions and forms, in place of those previously issued, with a view to enlarge the benefits of the warehouse system in this country. *Treas. Cir. & Dec.* by Ogden, page 118. Those regulations greatly advanced the

system by supplying important details, and by prescribing the mode in which the system was to be carried into effect.

Some few details, however, were prescribed in the Act itself, which must not be overlooked in this investigation. Importations in warehouse were assumed to be in the possession and under the control of the collector, and were to be kept at the charge and risk of the owner, importer, or consignee, and when withdrawn from warehouse, *the appropriate expenses* were to be paid by such owner, importer, or consignee. "Appropriate expenses" are the words of the act, but the expenses are in no way defined, except by necessary implication, arising from the obligation imposed of keeping the merchandise. Custody and control of merchandise in warehouse necessarily involves the expense of storage, superintendence, cartage and drayage. All of these elements of charge are obviously included in the term "appropriate expenses," but the amount is not prescribed, and was necessarily left to be ascertained under the regulations of the department. Moneys derived from that source are recognized by the act of the third of March, 1841, as public moneys, and collectors are required to pay the same into the treasury of the United States. 9 Stat. at Large, 349. *U. S.* v. *Walker*, 22 How. 313. Bonded warehouses, under the regulations of the seventeenth of February, 1849, were divided into three classes. 1. Public stores, or stores owned by the United States, or leased by them prior to the date of the regulations. 2. Stores in the possession and sole occupancy of the importer, and placed under a customs lock and that of the occupant, for the purpose of storing importations of the importer. 3. Similar stores in the occupation of persons desirous of engaging in the business of storing dutiable merchandise. Such classification was not, in terms, required by the act under consideration; but, in view of the explanations already given, it may be assumed that it was fully authorized by the fifth section.

Looking at the details of those regulations, and comparing them with the provisions of the act of the twenty-eighth of March, 1854, it will be seen that many of the latter were substantially borrowed from those regulations. Changes, undoubtedly, were made, and some entirely new provisions were enacted; but, in many respects, there is a marked similarity between the old regulations and the new law upon the same subject. All merchandise subject to duty might be warehoused under the act of sixth of August, 1846; but the regulations contained a provision that perishable articles and gunpowder, fire-crackers, and other explosive substances, should be sold

forthwith, or at the earliest day practicable, which rendered the privilege valuless in respect to all such articles; and the first section of the new law accordingly excluded those articles altogether from the benefit of the system. Other imported goods subject to duty, and which have been duly *entered* and *bonded* for warehousing, may be deposited, at the option of the owner, importer or consignee, at his expense and risk, in any public warehouse owned or leased by the United States, or in the private warehouse of the importer, the same being used exclusively for the storage of warehoused goods of his own importation or to his consignment, or in a private warehouse used by the owner, occupant, or lessee, as a general warehouse for the storage of warehoused goods, subject to the express conditions stated in the act, and such as are necessarily to be implied from other provisions. Such selected place of storage must be designated on the warehouse entry at the time of entering the merchandise a the custom-house.

But there are other and more material conditions expressly or impliedly annexed to the option given to the owner, importer, consignee, or agent, which it becomes important to notice. Warehouses for the deposit of imported goods are divided into two classes, public and private; but of the latter class there are two kinds, as already described. Importers, under that act, can have no option to deposit any importation in a public store unless such a store be owned or under lease by the United States, because one of the main purposes of the act was to discontinue the use of all such stores for warehousing, and to provide for the establishment of private bonded warehouses. Existing leases were to be cancelled at the shortest period of their termination, and new leases were forbidden at ports where there existed private bonded warehouses. Right of option, therefore, so far as public stores are concerned, must be considered as limited to cases where such stores were owned or under lease by the government. Conditions more express, however, in respect to the right of option to deposit imported goods in private warehouses, are to be found in the proviso annexed to the provision conferring the right. Stores must be first constituted private warehouses for the storage of warehoused goods within the meaning of the act, before any such option exists at all in respect to such stores.

Private warehouses, according to the first proviso of the section, must be used solely for the purpose of storing warehoused goods, and must have been previously approved as such by the Secretary of the Treasury, and have been placed in

charge of a proper officer of the customs, who, together with the owner and proprietor, shall have the joint custody of all the merchandise stored in the warehouse; and all the labor on the goods so stored must be performed by the owner or proprietor under the supervision of the officer of the customs in charge of the same, at the expense of the owner or proprietor. Cellars and vaults of stores for the storage of wines and distilled spirits only, and yards for the storage of coal, mahogany, and other woods and lumber, may, at the discretion of the Secretary of the Treasury, be constituted bonded warehouses for the storage of such articles under the same regulations and conditions as are required in the storage of other merchandise; but the cellars or vaults must be exclusively appropriated to the storage of wines and distilled spirits, and have no opening or entrance except from the street, and be under the separate locks of the custom-house and of the owner or proprietor.

Subject to these conditions and qualifications, the right of option undoubtedly is conferred by the act, but it is a mistake to suppose that it exists in the unrestricted and unqualified sense set up in the argument. Government had no public stores, except such as were already filled with imported merchandise; and in order to secure the right to deposit their importations in private warehouses, the plaintiffs found it necessary to comply with the conditions annexed to its enjoyment. Other differences exist between the act of the sixth of August 1846 and that of the twenty-eighth of March 1854, and one or two more of them may be profitably mentioned in connection with the question involved in this case.

Private warehouses might be agreed on between the collector and importer, under the former, subject only to the condition, that the same should be kept under the joint locks of the custom-house and the importer, not in terms forbidding the use of the building for other purposes: but the latter expressly requires that private warehouses shall be used solely for the purpose of storing warehoused goods, and the application must not only have been previously approved by the department, but the store must be under the charge of a proper officer of the customs. Provision is wanting in the act of the sixth of August, 1846, to save the government harmless from risk, loss, or expense in keeping the importation in private warehouse; but the third section of the latter act provides that before any store or cellar, owned or occupied by private individuals, shall be used as a warehouse for other merchandise,

the owner, occupant, or lessee shall enter into bond exonerating and holding harmless the government and its officers from any such risk, loss, or expense.

Authority to establish, from time to time, such rules and regulations, not inconsistent with the laws of the United States, as he might deem to be expedient and necessary, was also conferred upon the Secretary of the Treasury by the ninth section of this act. Pursuant to that authority, additional regulations and forms were framed on the second day of July, 1855, and promulgated on the same day, to give effect to the provisions of the several acts of Congress establishing and extending the warehouse system. Some alteration is made in the classification of warehouses, under these regulations, which must be briefly noticed. Class one is stores owned by the United States or hired by them prior to the date of the instructions, the leases of which have not yet expired or been cancelled. Classes two and three are the same as in the previous regulations, and need not be further noticed. Class four consists of yards and sheds of suitable construction, which, by the regulations, are allowed to be bonded in the manner prescribed for other depositories, and used for the storage of wood, coal, dye-woods, molasses, sugar in hogsheads and tierces, railroad, pig, and bar iron, chain cables, and other articles specially authorized. Bonded yards must be enclosed by substantial fences, with gates provided with suitable bars and other fastenings, so as to admit of being secured by customs locks, and must be used exclusively for the storage of the above named goods. Sheds, also, must be provided with suitable fastenings, and be secured by the different and separate locks of the occupant and of the customs. Cellars and vaults of stores occupied for general business purposes may, under certain prescribed conditions, be used by the owner or lessee as a bonded warehouse of class two, for the storage of wines and distilled spirits only and exclusively of his own importation. Neither stores, yards, sheds, cellars, or vaults are private bonded warehouses, within the meaning of the acts of Congress, until they are constituted such by the sanction of the proper authorities.

Merchants or other persons desirous of having any building constituted a private bonded warehouse of the second or third class, must apply to the collector of the port in writing, describing the premises, the location and capacity of the same, and setting forth the purpose for which the building is proposed to be used; as, whether for the storage of merchandise imported or consigned to himself exclusively, or for the general storage

of merchandise in bond. Examination of the premises is then directed, and a report of the particulars required to be made by the proper officers in writing. On the receipt of the report, it is the duty of the collector to transmit the same to the department, together with the application of the party, and certain required certificates, and a statement of his own views and opinion. Decision is then made by the Secretary of the Treasury, and, if the application is granted, the owner or occupant is then required to enter into a bond, of a prescribed form, in such penalty and with such security as the collector may deem proper. Applications for the bonding of yards and sheds as warehouses must be made in a similar manner, and under like regulations. Reg., July 2, 1855, p. 9. Express stipulation is contained in the prescribed form of the bond that the obligor will pay the salary of the officer in charge of the goods, or such part of the salary as may be required in pursuance of the regulations of the Treasury Department.

Merchandise in warehouse was covered by a bond, under the act of the sixth of August, 1846; but the place of deposit was only secured by the joint locks of the customs and of the owner or occupant, under the superintendence of the officer in charge. Places of *deposit* now, as well as the goods deposited, must also be covered by a bond, so that all such depositories, before the goods are placed within them, are in point of fact private bonded warehouses, as described in the act of Congress. Foreign merchandise received into public stores is declared, by the act of the third of March, 1841, to be subject, as to rates of storage, to regulations by the Secretary of the Treasury; but the charge on that account cannot exceed the usual rate at the port. 5 Stat. at Large, p. 432; Treas. Cir. and Dec., by Ogden, p. 132, sec. 35. Reg., July 2, 1855, p. 3. *Foster* v. *Peaslee*, Cir. Court Mass. Dist., Oct. Term, 1856. Rate of storage allowed to be charged under the regulations of the seventeenth of February, 1849, for the privilege of warehouse in stores of classes two and three, and for the time of the inspector in superintendence, was a sum equivalent to the pay of such officer, or one-half of the amount which would accrue as storage on the goods, if stored at regular rates in a public store. Other regulations and instructions upon the same general subject have been issued since those were promulgated.

Special reference is made by the plaintiffs to the regulations of the second of July, 1855, and they insist that the last named regulations had the effect to repeal those that previously existed,

so far, at least, as respects the rate of storage allowed to be charged in cases of this description. Direct repeal is not pretended; and the rule is, where there is no repealing clause, that the subsequent regulations only have the effect to repeal those previously existing, to the extent that those last issued are clearly repugnant to the former. Dwarris on Stat. p. 533. *U. S.* v. *Walker*, 22 How. p. 311. Half storage, it is admitted, was a proper charge, under the regulations of the seventeenth of February, 1849; and the admission is a very proper one, because the regulations expressly require the importer, before he can use his own store for such deposit, not only to request such use, but also to endorse on the entry an agreement to pay the collector an amount equal to the salary of the inspector, or one-half storage, and the importer was required to make his election in advance. Under the regulations of the second of July, 1855, the provision for store class two is, that for the time of the customs officer necessarily required in attendance at such store, the proprietor shall pay monthly to the collector of the port a sum equivalent to the pay of such officer, but the alternative provision for the payment of half storage is dropped. Unexplained and separated from other regulations *in pari materia*, the provision would seem to imply that the collector must in all cases exact a sum equal to the full salary of the officer in charge, which, in most conceivable cases, would be much greater than half storage. That provision is made more stringent in the regulations of the first of February, 1857, which provides that the proprietor shall pay monthly to the collector of the port such sum as he (the collector) may deem proper for the service, not less, however, than the pay of such officer. Gen. Reg. p. 211. Appropriate expenses were authorized to be charged, and required to be paid, under the act of the sixth of August, 1846; but the charge is described in the regulations of the seventeenth of February, 1849, as one "for the privilege" and for the "time of the customs officer necessarily employed in attendance at such store." Goods duly entered for warehousing under bond, may, according to the act of the twenty-eighth of March, 1854, continue in warehouse without the payment of duties, for a period of three years, and may be withdrawn for consumption on due entry and payment of the duties and charges, or upon entry for exportation within the same period, without the payment of duties; and the provision is, that in the latter case the goods shall be subject only to the payment of such storage and charges as may be due thereon.

Storage and charges, therefore, are the words of the last-named act, but the language of the regulations is, "for the time of the customs-officer necessarily required in attendance at such store." Those regulations, however, expressly recognize half storage as a proper charge in cases where liberty is granted to the importer after entry to take the whole or any part of the goods from the vessel by paying the duties on a withdrawal entry for consumption. Payment of one-half storage for one month is expressly required under those circumstances, and the same regulations provide that charges for storage, labor, and other expenses, accruing on the goods, shall not exceed the regular rates for such objects at the port. Unless the charges for storage can be allowed to exceed the regular rates at the port, it is difficult to see how an arbitrary rule requiring the collector to exact in all cases a sum equal to full salary of the officer in charge, could be sustained. One officer, under the regulations first issued, might have as many cellars in charge as in the judgment of the collector he could superintend efficiently, not exceeding six, and the same provision is retained in the subsequent regulations in the same words. Stores of class three were expressly excluded from that rule under the first regulations, and the prohibition was retained in those subsequently adopted, and made to include classes three and four. Class two was not within the prohibition, but the regulations of 1855 provided that where one officer had charge of more than one warehouse of the second class, or more than one cellar or vault, the amount to be contributed by each must be agreed on by the owners or occupants and the collector. Authority to make such agreements was not conferred by the regulations of 1849, and the provision was changed in those of 1857, so that the amount to be contributed by each must be determined by the collector; and an agreement in writing must be made in all cases for the payment of the compensation of the officer.

Collectors are authorized to accede to these arrangements when the circumstances render the arrangement reasonably practicable, and the public interest will not be prejudiced by it, but it is necessarily in their discretion to determine those preliminary inquiries.

Comparing the acts of Congress touching the matter in question, and the several regulations upon the same subject, one with another, it is quite obvious that the several provisions were al intended to accomplish the same general purpose. Warehoused merchandise is required to be kept by the government, and the keeping involves appropriate expenses, and the object of those

provisions was to supply the means to defray those expenses and save the government harmless. Differences of phraseology undoubtedly are noticeable, but those differences have respect to matters of detail, and not of principle or substance. Importers under the first regulations had, in express terms, an election whether to pay a sum equivalent to the salary of the officer in charge, or one-half storage at regular rates, in the public stores; and, taken as a whole, I am of the opinion that the subsequent regulations do not repeal that provision. Expressions are certainly to be found in the subsequent regulations, which, if taken separately, would strongly support the view that collectors are required in all cases to exact an amount equivalent to the salary of the officer in charge; but it is not possible to support the regulations at all, if that be their proper construction, for two reasons. Regarding the charge as storage and as an arbitrary exaction, then it would be contrary to law, because in most cases it would exceed the regular rates at the port; but if regarded as payment of the salary of the officer in charge, then the officer receiving it would incur a penalty of two hundred dollars. 1 Stat. at Large, p. 680. Difficulties so formidable cannot be overcome, and consequently the construction assumed by the plaintiffs must be rejected. Where the interpretation of the revenue laws and regulations are involved, considerable weight should be given to the practice of the government as a contemporaneous construction of the provision under consideration. When the subsequent regulations were issued, the practice was not changed, but continued the same; and as a general remark it may be said that it has never been changed to the present time. Full confirmation of the last remark, if any be needed, is found in the abstract of decisions forwarded to the collectors of the customs on the thirtieth day of June, 1857, by the Secretary of the Treasury. On that day certain additional instructions were issued to collectors, and the secretary took occasion to subjoin an abstract of decisions on questions under existing revenue laws. Among the abstract of decisions is one in respect to "storage in private stores;" and the instructions say, "it has been decided that in cases where goods are stored under bond in a private store, the importer shall either make monthly payment of a sum equivalent to the pay of an inspector placed in charge of the same, or one-half of the amount which would accrue as storage on the goods so stored if placed in public store, the importer to make his selection at the time of placing the goods in store." All of the collectors, it is believed, have conformed to that

decision since it was made, and in view of all the provisions upon the subject it is difficult to see what other rule can consistently be adopted except when the arrangement is made for one officer to have charge of more than one warehouse, as before explained. Warehouse Manual by Bruce, p. 205.

Several grounds are assumed by the plaintiffs to show their right to recover, but it is clear from the explanations already given that none of them can be sustained. 1. They insist that under the act of the twenty-eighth of March, 1854, they had a right to elect to deposit the importations in question in their own store, and that they were virtually deprived of that right by being compelled to accept the condition to pay half storage to secure the enjoyment of the right. Sufficient answer to this complaint has already been made in the previous explanations. Government had no public stores which were not full, and the plaintiffs had to comply with the regulations in order that their own stores might be constituted "private bonded warehouses." Election *was* made by them, and they *have* enjoyed the right, and in the language of the law must pay the appropriate expenses. 2. In the second place, they deny that there were any expenses, but the error of this assumption has already been shown, and the explanations need not be repeated. 3. Lastly, they insist that if the collector had a right to demand anything, it was a sum equivalent to the salary of the officer in charge, and not half storage, and that no such demand was ever made. Half storage, it is admitted, is much less than the salary of the officer, but the proposition is that half storage could not be exacted under the regulations; and, although the collector might have demanded a much larger sum, still, as the sum received could not be legally exacted in that form, they have a right to recover it back in an action for money had and received. After full consideration, I am of the opinion that no part of the proposition can be sustained. Half storage was properly demanded under the regulations; but if the collector accepted a less sum than he was entitled to receive, the plaintiffs in this form of action could not recover it back merely because the sum paid was characterized by a wrong name. In view of the whole case, I am of the opinion that the plaintiffs are not entitled to recover; and, under the agreement, and notwithstanding the verdict, there must be judgment for the defendant.

Superior Court of New York—General Term.

Before Barbour, Monell and Garvin, JJ.

NATHAN DAVIDSON *v.* THE MAYOR, &C., OF NEW YORK.

The action was brought to recover damages for personal property destroyed by a mob in the City of New York, in July, 1863.

The defendants demurred to the complaint, alleging that the facts stated did not constitute a cause of action.

The demurrer was sustained at Special Term, and the plaintiff appealed.

Thomas B. Barnaby, for appellant; John K. Hackett, for respondents.

By the Court: MONELL J.—An action does not lie at common law against a municipal corporation, to recover for injuries to person or property caused by a mob. This was conceded by counsel and is well settled.

The Legislature of this State, in 1855 (Sess. L., 1855, p. 800, ch. 428), enacted that, "Whenever any building or other real or personal property shall be destroyed or injured, in consequence of any mob or riot, the city or county in which such property was situated shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured, for the damages sustained by reason thereof."

The Act provides that actions may be brought and conducted in the same manner that other actions may be prosecuted by law, and directs that, "Whenever any final judgment shall be recovered against any such city or county, in any such action, the treasurer of such city or county shall, upon the production and filing in his office a certified copy of the judgment roll, pay the amount of such judgment to the party or parties entitled thereto, and charge the amount thus paid to said city or county."

The complaint alleges the unlawful assemblage, on the 14th day of July, 1863, of a mob of disorderly and riotous persons, and the destruction of the plaintiff's property by the mob; and contains a statement of facts sufficient to constitute a cause of action against the defendants, if the Act referred to can be sustained as a constitutional enactment.

The demurrer was sustained at the Special Term upon two grounds—first, that the Act is in conflict with the Constitution

of this State, which declares that no person shall be deprived of life, liberty, or property, without due process of law; and, second, that it impairs the obligation of a contract within the prohibition of the Federal Constitution.

I will first consider the provision in our State Constitution.

The liability created by the Act in question is in derogation of the common law, and was involuntarily imposed upon the defendants. The State, in the exercise of its sovereign power, holds the city responsible, without its consent, and without previous process of law, for the consequences of acts not committed by them, or by their authority or permission, but over which they could exercise no control, and which they had not the physical means to avert.

The decision at Special Term rested upon the ground that this legislative imposition of liability upon the city, by its consequences of a judgment for damages sustained by a citizen to his property, and the duty enjoined upon the treasurer to pay, does, in effect and in fact, deprive the defendants of their property, without due process of law, and is within the constitutional prohibition. Process of law does not mean legislative enactment, but condemnation by judicial decree; and the Legislature cannot usurp the right and the power of the courts to determine every question concerning life, liberty, or property.

It is a principle, fundamental with our Government, that the citizen shall be protected in the enjoyment of the blessings of life, liberty, and property. Every man, in surrendering his personal independence to the State sovereignty by yielding his support to the Government, and by his obedience to its laws, has the right to expect reciprocal protection.

Hence, since we ceased to be colonies of Great Britain, it has always been a provision of the organic law of the State that none of its members shall be disfranchished, or deprived of any of his rights or privileges, unless by the law of the land or the judgment of his peers.

If the consequences of a judgment recovered under the Act in question were to deprive the Corporation of the City of New York of any of its "property," as a private body, or artificial person, or to subject any of its property to the lien of such judgment, or to render it liable to be sold, then the Act, in my opinion, would be clearly unconstitutional and void.

No property is taken by the terms of the Act. The taking, if any there be, is only some compulsion to pay upon an involuntary liability. Money being property, the forced duty to pay money as effectually deprives the Corporation of its property,

as if its real estate, or rents, or franchises were, in terms, to be seized.

The Corporation of the City of New York, represented by the Mayor, Aldermen, and Commonalty, is the owner of both real and personal property. This property may, ordinarily, by process of law, be subjected to the payment of any debt which the Corporation, as an artificial person, may lawfully contract. In this respect, a municipal Corporation is regarded as a natural person, capable of making contracts, of suing and being sued, and may be compelled, in like manner, to discharge its obligations.

If, therefore, an execution could be issued upon a judgment recovered under the Riot Act, and levied upon any of the "property" of the Corporation, which it has obtained under its charters, or by subsequent purchase, and be sold in satisfaction of the judgment; or, if the city is compelled to pay its money to discharge these claims, then I am of opinion that the Act would be exposed to the constitutional objection.

But the terms of the Act forbid any such conclusion.

Without such a statute, a sufferer by a riot is remediless. The statute is, therefore, highly remedial; should be liberally construed, and must be taken entire. A part cannot be enjoyed, and the residue rejected.

The exigencies which originated the Act in question were the not unfrequent unlawful assemblages of disorderly persons, suddenly and unexpectedly overpowering the ordinary constituted authorities, and, in defiance of law, wantonly destroying life and property. During such periods, the citizen was powerless to shield himself, and looked in vain for help to the protecting arm of the law. His property was seized and swept to destruction, and his life imperiled or lost.

As, under our free institutions, private interest must yield to the public good, so sometimes, in the due dispensation and distribution of justice, private wrongs, which the Government was powerless to avert, may be redressed by removing the burden from the individual and placing it upon the whole community, or some large portion of it, such as might be culpable in not providing means to resist the assault, or most interested in defeating similar ones.

It seems to me that the Legislature was influenced by these considerations in passing the Act before us. They recognized the right of the citizen to demand of the people indemnity, where they had failed to shield from injury; and that the Legislature, in the exercise of its power to levy taxes, designed that

the people of the county or city whose authorities had failed to provide means of protection, should assume the burden of indemnity. It was not the intention of the Legislature, by imposing a liability upon a county or city, to do more than to designate a body politic, representing the inhabitants of a district, who might be proceeded against to obtain redress for losses which it was proper should be borne by them. Except that the people cannot be sued, the liability could as well have been imposed directly upon them, instead of their representatives. Hence the Act designates the city or county as the party to be liable. It is, in effect, a mere mode of assessing the damages occasioned by disorderly and riotous persons unlawfully assembled, with a provision for their payment by the treasurer of the city or county, and enabling the city or county, as a municipal or corporate body representing the people within its limits, to contest the amount of the recovery.

The Fire Act of 1806, which authorized the Mayor to direct the pulling down of buildings to arrest the progress of a fire (Valentine's Laws, 450, § 8), provided for an assessment of the damages to the owner; and after confirmation of the assessment by the Mayor's Court, directs the amount to be paid by the city. The Riot Act does no more than to require an assessment of damages, with a direction to the City Treasurer to pay. And it does not follow, that because the city or county is designated by the Act as the body to be proceeded against in ascertaining the amount of damages, that their municipal or corporate property is to be taken; or that it was intended that the damages, when put into the form of a judgment, should be a lien upon such property. I cannot, therefore, believe that the Legislature designed to give any other or greater force or effect to such judgment than is given in the Act itself; or to prescribe or allow any other mode of satisfaction than the means therein pointed out. If it had been the design to create a lien upon the corporate property, or subject it to levy and sale, a direction to the Treasurer to pay was wholly unnecessary. Such a lien, and a right to enforce it by sale, would have been incident to the judgment itself.

But the statute which fixes the liability, also provides for the satisfaction of the judgment. It directs the Treasurer to pay, and to charge the amount to the city or county made liable.

As I have said, the plaintiff has no right of action, and no remedy, except under the statute (*Almy* v. *Harris*), 5 J. R. 175), and if the statute does not furnish a complete remedy, he is without any.

In *Calking* v. *Baldwin* (4 Wend. 667), an Act of the Legislature authorized B. to erect a dam across the Seneca river, and empowered any three Judges of the Common Pleas to assess the damages of the owners of lands, which sum so assessed should be taken as a full compensation for such damages. MARCY J. says: "The Legislature have prescribed the mode in which the damages shall be ascertained, and in that mode only can they properly seek compensation.

So, under the Gaming Act, which gave an action of "debt," it was held that the statutory remedy must be pursued in form as well as in substance (*McKeen* v. *Caherty*, 3 Wend. 494). In that case the statute created a right which did not exist before, and prescribed a remedy.

It is provided by statute (1 R. S. 315, §§ 13, 25), that fines imposed by a regimental or battalion court-martial are to be collected by a warrant issued by the President, and it was held in *The People* v. *Hazard* (4 Hill, 207), they could be collected in no other way.

The Chancellor, in *Renwick* v. *Merris* (7 Hill, 575), says, where a new right is given, and a specific relief given for the violation of such right, the remedy is confined to that given by statute. So, in *Smith* v. *Lockwood* (13 Barb. 217), it is said, when a new right, or the means of acquiring it, are conferred, and an adequate remedy for its invasion is given by the same statute, parties injured are confined to the statutory redress.

If the statute under consideration provided no specific mode of payment, then, undoubtedly, the ordinary common law incidents necessary to render the judgment effectual would be inferred, although not mentioned in the statute. And even where the provision in a statute, designed to give effect to the power, is in such general terms as to render the design doubtful or uncertain, it should receive a liberal construction towards effectuating the power (*Bouton* v. *City of Brooklyn*, 15 Barb. 375), and STRONG J., in *Dudley* v. *Mayhew* (3 Coms. 15), says: "The principle, that, when a statute confers a right, and prescribes adequate means for protecting it, the proprietor is confined to the statutory remedy, is conformable to the manifest intention of the Legislature in such cases, and has, therefore, been properly settled in the Courts of England and in this country."

That the Legislature did not intend to give any other effect to their judgments than is contained in the Act, gains additional force from the duty of the Court in construing their Acts even in doubtful cases, to presume that the Legislature did not intend to take any individual or private property against a constitutional usurpation (*French* v. *Kirkland*, 1 Paige, 117).

The corporate capacity of "counties" is prescribed by statute (1 R. S. 364). They are declared to be bodies corporate; they may sue and be sued, and may purchase and hold real and personal property; but their powers as a body politic can only be exercised by the Board of Supervisors.

The liability of "counties," under the Act in question, is the same as that of "cities," and judgments must be satisfied in the same manner. An execution upon a judgment against a county, or against the Supervisors thereof, cannot be issued, nor can the corporate property be sold (2 R. S. 497, § 107). So far, therefore, as regards counties, which are protected from executions in all cases, the direction to the Treasurer to pay was quite unnecessary. In cities, however, which enjoy no such immunity, it was necessary to guard against the disturbance of any corporate rights of property. And I think the Legislature has done so, by providing for payment out of the city treasury (which treasury, under the authority conferred by law, from from time to time, upon the city, to levy taxes upon the taxable property of the citizens of the city, may be replenished), and by not providing any other mode of payment.

If I am right in my conclusions that a judgment recovered under the Act creates no lien upon property, that no property of the Corporation can be subjected to its payment, and that the burden of paying falls upon the tax-payers of the city, then it follows, I think, that the Act is not unconstitutional, unless levying a tax to reimburse the treasury is a taking of property within the meaning of Section 6 of Article 1 of the Constitution.

The power of taxation, both in cities and counties, is conferred by the Legislature, in either general or special laws.

General laws have been enacted giving authority to Boards of Supervisors to raise money by tax (1 R. S. 366, § 4; Laws 1840, ch. 194, § 34).

In this city no general authority exists. But the Legislature may, from time to time, authorize the levying of a tax to reimburse the treasury, or to provide for the payment of the expenses and liabilities of the city. An Act empowering the city to raise money by tax is annually passed by the Legislature.

The power of the Legislature to impose the burden of taxation upon the citizens cannot, I think, at this day be questioned. It is one of the duties which the citizen owes to the State, to contribute to its support; and the State, in virtue of the right of eminent domain, may compel the contribution. The compensation which the citizen receives, or is supposed to receive,

is in the protection of the Government, the security of life and liberty, and the enjoyment of property.

All right of property as regards its mode of enjoyment, burdens, alienations, transmission, or sacrifice, for the public good, depend upon positive municipal regulations of the sovereign power. The Constitution only intended to forbid the seizure and appropriation of private property for public uses, when it would thereby remain the private property of the community, as a body politic or corporate, although enjoyed by the public. Taxation is not so much the exercise of the right of eminent domain, as a sacrifice to public wants or necessities. It is not the resumption of property by the State, compensating the owner for its loss, but the appropriating it at once to some public purpose. The State, or its officers, are only invested momentarily or temporarily, in order to discharge obligations incurred for a public necessity. The public necessity, to which the payment of a tax is a sacrifice, must be determined alone by the Legislature; the elements of judgment, as to its existence or quantum, are so minute and various, that a judicial body cannot take cognizance of them.

The limitation of the region of taxation to raise funds for a particular purpose, does not affect the constitutional right any more than the regulation of the persons or property to be taxed. Either the Legislature is invested with sovereign, unlimited, unquestionable power, or every individual, and every kind of property, is to be taxed alike, or according to the benefits to be received; and courts cannot determine whether a tax is unconstitutional by reason of the persons to be taxed or exempted.

The power to tax for local as well as governmental purposes has always been upheld by the courts as being necessary to the due administration of the Government, and as imposing no new or improper burden upon the citizen.

In *Thomas* v. *Leland* (24 Wend. 65), the question arose under an Act of the Legislature, levying a tax upon property in Utica, to pay the cost of a change of terminus of the Chenango canal. Neither the City of Utica nor the inhabitants thereof were liable for such costs. The Court held the Act to be constitutional. There the Act subjected the taxable property of Utica to the payment of a debt, and shifted the burden from individuals to the taxpayers.

In *Morris* v. *The People* (3 Denio, 381), the Act sought to be invalidated declared that the salaries of the Judges of the Court of Sessions were county charges, and directed the Supervisors to pay; and it was held, that although the appointment

of Judge Lynch, one of the Session Judges, was illegal, the Act directing the payment of his salary was valid. Neither the city nor county could have been made liable except under the Act.

In *The People* v. *Mayor, &c., of Brooklyn* (4 Com. 419), the whole subject of taxation for local purposes received the careful consideration of the court. Judge Ruggles in that case says (p. 422): "The right of taxation and the right of eminent domain rest substantially upon the same foundation. Compensation is made when private property is taken in either way. Money is property. Taxation takes it for public uses, and the taxpayer receives, or is supposed to receive, his just compensation in the protection which the Government affords to his life, liberty and property, and the increase of the value of his possessions, by the use to which the Government applies the money raised by the tax." The assessment, in that case, was for a local improvement, the benefits of which were enjoyed by a few only of the citizens of Brooklyn. But the court upheld the assessment, on the ground that an assessment being a tax, it was not in conflict with the Constitution to confine the tax to any prescribed limits.

In *Bank of Rome* v. *Village of Rome* (18 N. Y. R. 38), an act was sustained which authorized the defendants to subscribe to the capital stock of a railroad company, and to issue their corporate bonds therefor.

In *Brewster* v. *The City of Syracuse* (19 N. Y. R. 116), J. and W. Ley had constructed a sewer under a contract with the city of Syracuse, and had been paid in full. Afterwards an act was passed, directing the common council of Syracuse to assess and collect $600, and to pay it to the Leys as an additional compensation. The Leys before the act had no claim whatever against the city, and the charter prohibited the city from paying anything above the contract price. But the court say, "The expense was imposed on that part of the citizens interested in the improvements by virtue of the discretionary power of the legislature to impose the public burdens on those who in its judgment ought to bear them.

I will refer on this point to but one case more, that of *Gifford* v. *The Supervisors of Chenango County* (13 N. Y. R. 143). In that case it was attempted to restrain the supervisors from levying and collecting from the taxable property of the citizens of a town a sum awarded to Cornell & Clark under an Act of the Legislature, and for which, except under the act, the town was in no way liable. Judge Denio there says (p. 149):

"The legislature is not confined in its appropriation of the public moneys, or of the sums to be raised by taxation in favor of individuals, to cases in which a legal demand exists against the state. It can thus recognize claims founded in equity and justice, in the largest sense of these terms, or in gratitude or charity. Independently of express constitutional restrictions it can make appropriations of money whenever the public well-being requires or will be promoted by it; and it is the judge of what is for the public good. It can, moreover, under the power to levy taxes, apportion the public burdens among all the tax-paying citizens of the State, or among those of a particular section or political division. It is well settled that the authority to raise money by the exercise of the taxing power is not in conflict with the constitutional provisions protecting private property from seizure."

The only conceivable difference between the cases to which I have referred and the question I am considering is, that the Riot Act does not authorize the levying of a tax to place funds in the treasury to pay the judgments. That difference may affect the efficiency of the law, may deprive the plaintiff of the means of obtaining satisfaction of his judgment until further legislation is had, but it does not render the law invalid. It rather sustains it in the view taken by the learned justice below.

My conclusion upon this branch of the case is, that the act does not allow judgments recovered under it to be collected in any other manner than is prescribed by the act; that such judgments have not the attributes of ordinary judgments, and that none of the corporate property of the city can be seized or made liable for their payment. The burden of paying them falls upon the taxpayers of the city, and not upon the city. The act, therefore, does not conflict with any provisions of the constitution of this State.

The second ground is, that the effect of the act is to impair the obligation of a contract.

I agree with the learned judge at special term, that the charter of the city is so far a contract between the State and the corporation, that its right to hold and enjoy its property cannot be impaired or destroyed by subsequent legislation. The constitution does not exempt charters from legislative control or interference, whenever, upon principles of law, such control or interference would be valid. Their recognition does not impair the power to alter, amend, or modify, so long as no grant of property, or franchises, coupled with a right of property, is taken from them. Nor does the State lose the

right of making laws concerning chartered corporations, so long as they remain *publici juris*. The grant is, therefore, subject to remedial legislation, and amenable to general laws. And as an illustration of this principle, I may observe that the charter of the city of New York has repeatedly been subjected to change, both by the colonial government and by our State Legislature.

I have endeavored to show that the act before us does not deprive the city of any of its property, and that the power to tax is a constitutional power. If I have succeeded in establishing those propositions, then it necessarily follows that no vested right of the city has been disturbed, nor has the obligation of any contract been impaired.

In the *Charles River Bridge Case* (11 Peters, 420) the right of the Legislature to interfere and take away a vested right was clearly and distinctly recognized and decided. There the emoluments of a toll-bridge had been enjoyed under a special charter for more than forty years; yet the Legislature chartered a rival company, with corporate rights and powers injurious to those of the old company. The right was admitted to be vested in the old company, but it was not doubted that the Legislature could take it away.

The *Dartmouth College Case* (4 Wheat. 519) is relied on as an authority that the Legislature cannot interfere with vested rights. But it will be seen that the distinction between public and private corporations is marked with emphasis by the eminent Judges who delivered opinions in that case. The extent of that decision is that an eleemosynary corporation, founded by private contributions, for the distribution of a general charity, is not an instrument of government, whose officers are public officers, but a private corporation, whose charter is a contract between the donors, trustees, and the government, founded on the consideration of public benefit to be derived from the corporation, which cannot be altered, amended, or modified without the consent of the corporation.

The corporation of the city of New York is a public corporation (2 Kent Com. 305; *People* v. *Morris*, 13 Wend. 325; *Purdy* v. *People*, 4 Hill, 384), deriving its corporate rights, first from the crown of Great Britain, and since, from the recognition of those rights by our State constitutions. Yet no one, I think, can doubt that the Legislature can at pleasure change or suspend the political or governmental powers of the city (for these are not vested rights as against the State, and may therefore be abrogated by the legislature), and may alter

or amend any of the provisions of its charter, so long as there is no deprivation of or interference with her vested rights of property.

This power of the Legislature over charters was recently fully discussed and considered in the Court of Appeals, in *The Chenango Bridge Co.* v. *The Binghampton Bridge Co.* (26 How. Pr. R. 124, 297), where the power is fully recognized.

The English statutes (13 Ed. I, and 27 and 28 Eliz.) giving remedies for injuries caused by a riot, to which we were referred, furnish no aid in determining the constitutional question arising under ours. Parliament is the highest law-making power of Great Britain, and it can conflict with nothing. Our Legislature is limited and circumscribed by a higher law, which they, as well as the courts, must obey.

The question before us was directly involved in the case of *Wolfe* v. *Supervisors of Richmond Co.* (11 Abbott 207). The learned judge who decided that case, and whose opinions are always entitled to great weight, sustained the act, in a well reasoned opinion, which it seems to me is supported in principle and by authority. Especially by the terse and direct annunciation of Mr. Senator Verplanck, 1840, in *Stone* v. *The Mayor &c.* (25 Wend. 181), who says: "The Legislature might, with perfect justice, if sound policy was thought to require it, make our towns or counties severally responsible for damages hereafter arising from robbery within them, or from public tumults, on the principle of the English Riot Act."

I have thus given this question the careful examination which its importance deserves. I have cast aside all those presumptions which go to sustain an act until its invalidity plainly appears; and I have looked attentively into every part of it, tracing its probable and even possible effects upon the city, with a jealous regard for its corporate rights, to see if I could find any power improperly exercised by the Legislature, and I have found none.

We have nothing to do with either the wisdom, policy, or justice of the law. Those questions were with the Legislature, not with us.

My conclusion is, that the act does not conflict with any provision in the State or Federal Constitution, and is a valid law.

The judgment of the Special Term should be reversed, with costs, and leave given to the defendants to withdraw the demurrer, and to answer on payments of costs.

GARVIN J. concurred.

Supreme Court of Indiana.

May Term.

WARREN *v.* PAUL.[1]

CONSTITUTIONAL LAW.—The provision of the internal revenue act of July 4, 1864, requiring writs in State courts to be stamped, is not within the sphere of the legislative powers of the Federal Government, and is inoperative.

SAME—HABEAS CORPUS.—Section 8 of Art. 1, of the Constitution of the United States, contains a delegation to Congress of power to suspend the writ of habeas corpus.

Appeal from the ELKHART Common Pleas.

PERKINS J.—Suit to recover possession of personal property. Suit dismissed by the court, on motion of defendant, and a return of property ordered, because papers were not stamped as required by act of Congress. The court refused permission to plaintiff to affix stamps, in court, to avoid a dismissal. The internal revenue act of July 4, 1864, enacts that stamps upon legal documents shall be thus:—

"Writ, or other original process by which any suit is commenced in any court of record, either of law or equity, fifty cents.

"Where the amount claimed in a writ, issued by a court not of record, is one hundred dollars or over, fifty cents.

"Upon every confession of judgment, or cognovit, for one hundred dollars or over, (except in those cases where the tax for the writ of a commencement of suit has been paid,) fifty cents.

"Writs or other process on appeals from justices' courts or other courts of inferior jurisdiction to a court of record, fifty cents.

"Warrants of distress, when the amount of rent claimed does not exceed one hundred dollars, twenty-five cents.

"When the amount claimed exceeds one hundred dollars, fifty cents: *provided*, that no writ, summons or other process issued by and returnable to a justice of the peace, except as hereinbefore provided, or by any police or municipal court having no larger jurisdiction as to the amount of damages it

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[1] This case is reprinted from advance sheets of the twenty-second volume of Indiana reports, the importance of the question involved justifying the earliest possible presentation to the profession.

may render than a justice of the peace in the same State, or issued in a criminal or other suits commenced by the United States or any State, shall be subject to the payment of stamp duties; *and provided further*, that the stamp duties imposed by the foregoing Schedule B on manifests, bills of lading, and passage tickets, shall not apply to steamboats or other vessels plying between ports of the United States and ports in British North America.

"Affidavits in suits or legal proceedings shall be exempt from stamp duties."

We quote this, being the latest act, because it involves the question to be decided, which is, Has Congress power to tax legal proceedings in the State courts?

The powers of Congress are delegated by the Constitution: and "the powers not delegated to the United States by the Constitution, nor prohibited by it, to the States, are reserved to the States respectively, or to the people."

We start out, then, with the constitutional fact that State governments are to exist concurrently with the United States government, possessed of independent powers, beyond the control of the United States government; for they, and their people, possess all powers not granted to the United States. State governments, then, are to exist.

The powers delegated to the general government are specified in Sec. 8 of Art. 1. Section 9 of the same article contains restrictions and limitations on the powers granted generally in section 8, and section 10 of the same article contains the prohibitions upon the States.

Section 8 of Art. 1, delegates power to Congress to organize courts, and therein, we may here remark, delegates to Congress power both to authorize the issue, and to suspend the issue of the writ of habeas corpus, because that is a judicial writ, and the power to organize courts includes the power of determining what writs they may issue, or not issue, from time to time; hence it was necessary to place the restriction upon the power thus delegated to Congress to legislate for the courts which is contained in sec. 9, viz.: That Congress should not, in so legislating, withhold from them the right to issue the well known judicial writ of habeas corpus, except, &c.

But there is no express delegation of power in the Constitution to Congress to legislate for State courts, and none ought to be delegated incidentally.

The Constitution, in sec. 8, delegates to Congress the power to lay and collect taxes, duties, imposts and excises; but no

direct tax shall be laid unless in proportion to the census, and duties, imposts and excises must be uniform, &c.

The Constitution seems to contemplate three kinds of taxes as within the power of Congress, viz. :—

1. Direct taxes.
2. Duties or imposts.
3. Excises.

Such taxes Congress may lay and collect; and it certainly is not clear that it can any other; 1 Story on Const. §§ 950, 951, *et seq.* The stamp tax upon legal documents does not fall within either of these classes. It is a tax on the right to justice. See Smith's "Wealth of Nations," p. 371; Say's "Political Economy," 6th Am. ed., p. 460, note; "New American Cyclopedia," vol. 7, p. 365. John Stuart Mill, in his late work on "Political Economy," classes this description of tax under the head of "some other taxes," vol. 2, p. 460; and on p. 465 of the same volume, he says: "In the enumeration of bad taxes, a conspicuous place must be assigned to law taxes; which extract a revenue for the State from the various operations involved in an application to the tribunals. Like all needless expenses attached to law proceedings, they are a tax on redress, and therefore a premium on injury." He says they have been mostly abolished in England, since their injustice was so clearly demonstrated by Bentham. See Say, *supra*.

But conceding for the purposes of this case that Congress may lay and collect stamp taxes, we hold that they cannot be laid, by that body, on proceedings in the State courts. This question is not entirely new. In 1797 Congress passed a stamp act. The point was then made, that Congress could not even require a license from attorneys to practice in State courts, but might to practice in the United States courts; and the law then enacted respected the rights of the States in these particulars; Bent. Deb., vol. 2, p. 155; Story's "Laws of United States," vol. 1, p. 466.

State governments, as we have seen, are to exist with judicial tribunals of their own. This is manifest all the way through the Constitution. This being so, those tribunals must not be subject to be encroached upon or controlled by Congress. This would be incompatible with their free existence. It was held when Congress created a United States bank, and is now decided when the United States has given bonds for borrowed money, that as Congress had rights to create such fiscal agents and issue such bonds, it would be incompatible with the full and free enjoyment of those rights to allow that the States might

tax the bank or bonds; because, if the right to so tax them was conceded, the States might exercise the right to the destruction of congressional power. The argument applies with full force to the exemption of State governments from federal legislative interference.

There must be some limit to the power of Congress to lay stamp taxes. Suppose a State to form a new or to amend her existing Constitution, could Congress declare that it should be void unless stamped with a federal stamp? Can Congress require State legislatures to stamp their bills, journals, laws, &c., in order that they shall be valid? Can it require the executive to stamp all commissions? If so, where is he to get the money? Can Congress compel the State legislatures to appropriate it? Can Congress thus subjugate a State by legislation? We think this will scarcely be pretended. Where, then, is the line of dividing power in this particular? Could Congress require voters in State and corporation elections to stamp their tickets to render them valid?

Under the old confederation, Congress legislated upon States, not upon the citizens of the State. The most important change wrought in the government by the Constitution was that legislation operated upon the citizens directly, enforced by federal tribunals and agencies, not upon the States.

Another established constitutional principle is that the government of the United States, while sovereign within its sphere, is still limited in jurisdiction and power to certain specified subjects. See *Hopkins* v. *Jones*, post.

Taking these three propositions, then, as true:—

1. States are to exist with independent powers and institutions within their spheres.

2. The federal government is to exist with independent powers and institutions within its sphere.

3. The federal government operates, within its sphere, upon the people in their individual capacities, as citizens and subjects of that government, within its sphere of power, and upon its own officers and institutions as a part of itself.

Taking these propositions as true, we say, it seems to result as necessary to harmony of operation between the federal and State governments, that the federal government must be limited, in its right to lay and collect stamp taxes, to the citizens, and their transactions as such, or as acting in the federal government, officially or otherwise; and cannot be laid upon and collected from individuals on their proceedings when acting, not as citizens, transacting business with each other, as such,

but officially, or in the pursuit of rights and duties in and through State official agencies and institutions. When thus acting, they are not acting under the jurisdiction nor within the power of the United States; not acting as subjects of that government; not within its sphere of power over them; and neither they nor their proceedings are subject to interference from the United States. Can Congress regulate, or prescribe the taxation of, costs in a State court? The federal government may tax the governor of the State, or the clerk of a State court, and his transactions as an individual, but not as a State officer. This must be so, or the State may be annihilated at the pleasure of the federal government. The federal government may, perhaps, take, by taxation, most of the property in a State, if exigencies require, but it has not a right, by direct or indirect means, to annihilate the functions of the State government.

Per Curiam.—The judgment below is reversed, with costs. Cause remanded, &c.

Robert Lowry, for the appellant.

John H. Baker, for the appellee.

Appeal from the ELKHART Common Pleas.

Per Curiam.—The judgment in this case is reversed with costs, cause remanded, &c., for the reasons given in *Warren* v. *Paul*, at this term, the same questions being involved in both cases.

Robert Lowry, for the appellant.

John H. Baker, for the appellee.

RECENT ENGLISH CASES.

Court of Exchequer.

HARRISON *v.* GREAT NORTHERN RAILWAY COMPANY.

Remoteness of damage—Liability for negligence when the accident would not have happened without the wrong doing of a third party.

The defendants were bound to keep in repair a sufficient drain to carry certain water into a river which was under the care of certain commissioners. The bank of the drain having given way, and the plaintiff's land been flooded,

it was found by the jury—first, that the bank had been improperly repaired; secondly, that the accident was occasioned by the wrongful act of the commissioners in penning back the waters in the drain; thirdly, that the accident would not have happened if the bank had been properly repaired.

Held, that, under these circumstances, the defendants were liable.

This was a case tried at the last Spring Assizes at Lincoln. It appeared that a company had been formed at the beginning of the century for the purpose of carrying out certain drainage works in Lincolnshire, and in particular to construct a delph or drain running into the river Witham at Horsleydeeps, and that by 10 Geo. IV. c. 123, they were bound to keep this delph in sufficient repair.

The Great Northern Railway Company, by their act, 9 & 10 Vict. c. 71, were required to take a lease of their property for 999 years from the above company, and to perform all the duties which they had been bound to perform.

The river Witham, below Horsleydeeps, was under the management of certain commissioners, who were bound to keep it of a certain width and depth. These commissioners having neglected to clean the river, the water in the delph was penned back, and, on the occasion of some heavy floods in March, 1862, one of the banks gave way, and the neighboring lands, including those of the plaintiff, were placed under water and greatly injured. It was contended, on the part of the plaintiff, that the bank had been improperly repaired, and that it was owing to this that it had given way. The defendant contended that the accident was entirely owing to the neglect of the commissioners in not keeping the river clear below Horsleydeeps.

The jury found, in answer to questions submitted to them by the judge,—first, that the bank had been improperly repaired; secondly, that the accident was caused by the water being penned back through the neglect of the commissioners; thirdly, that it would not, however, have happened if the bank had been properly repaired. The judge ordered the verdict to be entered for the plaintiff on this finding, and

Bovill, Q. C., having obtained a rule *nisi* to enter the verdict for the defendant, or to reduce the damages to a nominal sum,

Field, Q. C. (*Macauley*, Q. C., with him), now showed cause. The first and third findings make the second immaterial; the defendants having made the delph and brought the waters there, were bound to prevent its injuring the neighboring proprietors. [BRAMWELL B.—The defendants were only bound to construct a bank which would support the water which could rightly be there.] The defendants caused the injury by making

the bank so high as to contain the water; if it had been lower, a small quantity only would have overflowed. No action will lie against the commissioners, because they would say, if the bank had been good, as we had a right to expect, there would have been no damage. The defendants were bound to provide against any reasonable rise of the water, and they endeavored to do so, for they made the bank high enough to prevent the water from overflowing.

Bovill, Q. C. (*Bowden* and *Beasley* with him), in reply.—The declaration is not framed on common law grounds, and could not be; it rests entirely on 10 Geo. IV. c. 123, § 10. It is admitted that the commissioners had broken their statutory obligations, and thereby not only penned back the water in the delph, but driven additional water into it, yet the bank withstood the pressure for two and a half days before it gave way It is the same as if a man builds a house with its walls one brick thick, when it is provided by Act of Parliament that the walls shall be one and a half thick. The house stands for a time, and would continue to do so, but a man drives against it and knocks it down, and in falling it kills somebody, would it be said that the owner of the house was the proximate cause of the injury? so, too, the acts of the commissioners, and not of the defendants, caused the injury to the plaintiff. [Bramwell B.—A man driving against the house is one of the accidents you are bound to provide against. I think there is more doubt in the principal case, because the act only says that there shall be sufficient banks, and it may be asked, "Sufficient for what?"] The Legislature cannot be supposed to have in view the wrongful acts of third parties, or to impose on those with whom it deals the burden of providing against them.

Pollock C. B.—In this case the defendants, for their own profit as owners of a navigation, had undertaken the burthen of maintaining a delph, or cut, for the carrying off of certain water. This they have maintained in an improper manner; that is to say, improper in the sense that the banks of it were not sufficient to resist the water they would contain, such insufficiency being owing to bad construction. It was not shown that they were insufficient to hold the water that would come there by the wrongful act of others, which I am about to name; but they were insufficient in relation thereto. The outlet of the delph was in a certain channel, the commissioners for the management of which were bound to keep it of certain dimensions. They did not; and, by reason thereof, as found by the jury, the water in the delph was penned back,—possibly, even,

water flowed from below into it. It consequently rose in the delph, and owing to its rising, and the defective construction of the banks, they gave way, and the plaintiff's land was inundated and damaged. The jury further found that but for this wrongful conduct of the commissioners the mischief would not have happened. The defect, however, of the channel in which the delph had its outlet, was not of recent occurrence, but of long standing, and, on former occasions, the water had by the same cause been penned up in the delph. Further, there was nothing in the weather of so extraordinary a character that the defendants were not bound to anticipate it. The storm, though unusual and extraordinary in a sense, yet, as happening once in a year, or in a few years, was not unusual. It was argued for the plaintiff that the defendants were insurers; that is, they, for their purposes, had the delph and brought the water there, and were bound to restrain it. It is not necessary to decide this, as we think they are liable on other grounds. They are bound to maintain a sufficient cut or delph. The sufficiency of a cut depends on its depth, width, fall, and outlet, as compared with the water likely to be in it. Now, in this case the cut was not sufficient to hold the water likely to be in it, owing to the condition of its outlet. If no one was under any obligation in relation to that outlet, it is clear that that was insufficient, and that the defendants would be responsible. Are they less so because there is an obligation on the others as to the outlet which is not performed? We think not. It is not the case of a sudden wrong done by others in stopping up the outlet. It is a permanent, long continuing state of things, which it was the duty of the defendants to obviate or guard against. Suppose A has a drain through the lands of B and C, and C stops up the outlet into his land from B's, and A, nevertheless, knowing this, pours water in the drain and damages B, surely A is liable to B? The present law may be tested thus:—Suppose the plaintiff sued the sewer commissioners for this damage, could they not truly say they had not caused it? I think they could. They would say the proximate cause was the defective bank, and it was so; and so the defendants are liable, and the plaintiff is entitled to judgment. The rule will, therefore, be discharged.

Privy Council.—June 30.

BLACK, *Appellant*, v. ROSE, *Respondent*.[1]

Ship and shipping—Lien of shipowner for freight when cargo is discharged at the ship's side.

A merchant and the master of a ship signed a charter-party which provided that the vessel, after the discharge of her cargo of salt in Calcutta, shonld load there from the charterer's agents a full and complete cargo of rice, and, belng so loaded, should sail and proceed to Colombo for instructions as to whether the said cargo should be delivered at that port or in Point de Galle, or part in Colombo and part in Galle; freight to be paid at and after the rate of one rupee and four annas per bag of rice of two maunds, on the quantity safely delivered; twelve working days for loading in Calcutta, and fifteen working days for discharging at Galle or Colombo: to commence from the time the master gave notice that he was ready to receive and discharge cargo, or demurrage to be paid at the rate of £20 per day for every day over and above the said working days. *"The cargo to be taken alongside, and to be taken from the ship's tackle at the port of discharge, free of risk and expense to the ship."* Bills of lading of the rice shipped by the vessel were sent by the shippers to the charterer and received by him, which stated that the cargo was to be taken from the ship's tackle at the risk and expense of the consignees, and a receipt granted on board.

Held, that the master, upon the arrival of the vessel at her port of destination, was justified in refusing to discharge any part of the cargo without payment at the ship's side of freight on the quantity delivered, and that the charterer, having refused to assent to these terms, was liable to demurrage.

This was an appeal from the Supreme Court of the island of Ceylon, in an aetion in which the appellant was the plaintiff, and the respondent the defendant.

The action was brought against the defendant for not delivering a portion of a cargo of rice which had been shipped on board his vessel, pursuant to the terms of a charter party. This charter-party was as follows:—

"GALLE, April 16, 1861.

"It is this day mutually agreed between John Black, of Gallee, and James Rose, master of the A 1 ship *Alpine*, of 1,164 tons register, that the said vessel, being tight, staunch, strong, and in every way fitted for the voyage, shall, after the discharge of her cargo of salt in Calcutta, load there from charterer's agents a full and complete cargo of rice, not to exceed 16,000 bags, and the balance to complete her loading

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[1] Before Lord KINGSDOWN, SIR J. COLERIDGE, and SIR E. RYAN.

to be of light freight; and, being so loaded, shall sail and proceed to Colombo for instructions as to whether the said cargo shall be delivered at that port or in Point de Galle, or part in Colombo and part in Galle; freight to be paid at and after the rate of one rupee and four annas per bag of two maunds, and light freight at £2 10*s.* per ton, as per Calcutta scale of tonnage, on the quantity safely delivered; twelve working days for loading in Calcutta, and fifteen working days for discharging at Galle or Colombo, including both places, but exclusive of time occupied in changing ports; to commence from the time the master gives notice that he is ready to receive and discharge cargo, or demurrage to be paid at the rate of £20 per day for every day over and above the said working days; the cargo to be taken alongside, and to be taken from the ship's tackle at the port of discharge, free of risk and expense to the ship. Five per cent. commission on the gross amount of freight laden in the vessel to be paid to Messrs. Jardine, Skinner, & Co., Calcutta, on account of John Black. The act of God, Queen's enemies, fire, and all other dangers of seas, rivers, and navigation, excepted. Penalty for non-performance of this charter-party, estimated amount of freight.

"JOHN BLACK,
"JAMES ROSE."

The cause was tried before the Judge of the District Court of Galle, on the 3d of October, 1861. The facts appeared to be as follows:—In September, 1861, the *Alpine*, with her cargo of rice on board, arrived at Galle. Notice of her arrival was given to the plaintiff by the proctor employed by the defendant, who stated that freight must be paid according to the quantities of goods delivered at the ship's side. The defendant objected to this, but said that he was willing to pay freight upon due delivery of the cargo into the custom-house. After some letters had passed between the parties concerning the time of payment of freight, the defendant's proctor wrote, saying that the captain would consent to his receiving freight on the quantity of cargo delivered daily, instead of demanding freight on each parcel delivered; but that this concession must not be construed as a waiver of any lien that he might have upon the cargo, or of the privilege of withdrawing this consent at any future period of the discharge. The plaintiff then commenced unloading the cargo, but a few days afterwards the lighters which he had sent for that purpose came back empty, as the captain refused to go on with the delivery unless he were paid

freight on receipt at the ship's side. The reason assigned for this refusal was, that there had been delay in the daily payment of the freight. The plaintiff refused to make his payments in the manner required, and paid the freight into the hands of the collector of the customs, to be held in deposit until the cargo had been landed. After waiting for some days, and finding that the captain would not depart from his terms, this action was commenced against him. A cross suit was also commenced against the plaintiff by the captain, in order to recover demurrage. The district judge gave judgment for the defendant, upon which the plaintiff appealed to the Supreme Court. On the 3d of July, 1862, the judgment of that court, affirming the decree of the court below, was delivered by Sir E. CREASY C. J., as follows :—

"BLACK *v.* ROSE, and ROSE *v.* BLACK.

"These were cross actions between a shipowner and a merchant, and the main point in dispute was, whether the shipowner was entitled to require payment of freight as the goods were delivered into the merchant's boats over the ship's side, or whether he was bound to deliver the whole cargo into the boats, and wait till it was brought on shore before he had his freight. The merchant had, by a charter-party dated the 16th April, 1861, chartered the ship to fetch a cargo of rice from Calcutta to Colombo, to be unladen there, or at Galle, or part at each place, according to instructions. The dispute arose about the part which (as was agreed) the ship was to deliver at Galle. The parts of the charter-party material for the decision of these cases are as follows :—

"Freight to be paid at and after the rate of one rupee and four annas per bag of rice of two maunds, and light freight at two pounds ten shillings per ton, as per Calcutta scale of tonnage, on the quantity safely delivered; twelve working days for loading in Calcutta, and fifteen working days for discharging at Galle or Colombo, including both places, but exclusive of time occupied in changing ports; to commence from the time the master gives notice that he is ready to receive and discharge cargo, or demurrage to be paid at the rate of twenty pounds sterling per day, for every day over and above the said working days; the cargo to be taken alongside, and to be taken from the ship's tackle at the port of discharge, free of risk and expense to the ship."

The ship proceeded to Calcutta, and took in her cargo. The

master drew and sent bills of lading to the merchant, which the merchant received, and which stated that freight was to be as per charter-party, but which contained the following stipulation as to the delivery of the cargo:—"To be taken from the ship's tackle, at the risk and expense of the consignees, and a receipt to be granted on board." The ship delivered part of her cargo at Colombo, and then proceeded to Galle, by instructions, to deliver the residue. Various quarrels took place between the parties, into which it is unnecessary to enter; but at last, after some cargo had been delivered, the master required the merchant to pay daily the freight for the amount of cargo delivered each day over the ship's side into the merchant's boats, and refused to deliver more cargo on the merchant's refusing to pay on delivery as required. The question is, Was the master justified in such requirement and refusal? and we think that he was. As a general principle, where there is no express stipulation as to the time and manner of payment of freight, the master is not bound to part with the goods until his freight is paid. This is expressly laid down in "Abbott on Shipping," the highest authority on the subject, and the same doctrine is laid down in perhaps the next highest authority—"Kent's Commentaries," vol. iii. p. 293. It was urged on behalf of the merchant in this case, that, where the time and mode of paying freight are left uncertain by the contract, the custom of the port of delivery is to prevail; and some evidence, though very feeble, was given, that it is not usual at Galle to pay freight till the whole cargo is brought on shore. "Smith's Mercantile Law" was cited on this point. The words are, "The manner of delivering up the goods, and consequently the period at which the master ceases to be responsible for them, depends, in the absence of agreement, on the custom of the place." Mr. Smith cites a case from Espinasse which by no means bears out his text; but even if it did, that text has no application here. In this case the charter-party provides that "the cargo is to be taken alongside, and to be taken from the ship's tackle at the port of discharge, free of risk and expense to the ship;" and the bills of lading provide that "the cargo is to be taken from the ship's tackle at the risk and expense of the consignee, and a receipt to be granted on board." It is further in evidence that an agent of the merchant was on board of the vessel during the days on which the delivery went on, and that he gave receipts, though the form of the receipts does not appear on the face of the proceedings before us. We think it clear that in this case it was intended

that the master should deliver, and the merchant receive, at the ship's side; that on such delivery and receipt the master ceased to be responsible for the goods, and also ceased to have any lien on the goods. It is clear, on all authority and common sense, that he had a right to be paid before he gave up his lien.

It has been said on the other side that it was impossible for the merchant to examine the condition and weight of the bags of rice as they came out of the ship. No evidence was given of this. The contrary would appear to have been the case, from the fact of the merchant having, for several days before the quarrel, sent his agent on board to superintend the delivery and acceptance of the cargo from the ship into the boats. And even if there had been any difficulty of this kind, it was one which the merchant brought upon himself by the mode in which he contracted. As we hold that the merchant's refusal to pay freight on delivery was wrongful, we must hold that his omission to unload and receive the cargo on the proper terms was wrongful also, and that the part of the judgment which fixes him with demurrage is correct. Objection has been made to that part of the judgment which gives interest on the demurrage, and it is urged that demurrage is in the nature of damages, so that interest is not to be given on it. We think that this objection is well founded. The verdict in the case of *Rose* v. *Black*, is therefore to be reduced by disallowing interest on the demurrage. In other respects the judgments of the District Court in both cases are affirmed.

From the above decision there was the present appeal to the Privy Council.

Macnamara (*Denman* with him) for the appellant. The judgment of the court below was wrong. The stipulation that freight was to be paid on the "quantity safely delivered," shows that the owner must be allowed conveniently to ascertain what that quantity is. To examine and weigh every bag of rice on board the ship, or a lighter at the ship's side, would be almost impossible, It could never have been in the contemplation of the parties that the shipowner should be subjected to such inconvenience. The evidence offered by the plaintiff of the custom of the port is perhaps not strong; but, then, it was almost uncontradicted. The master's lien could always be preserved by landing and warehousing the cargo, to be detained until that lien is satisfied.

He cited Abbott on Shipping, 300; and Maude and Pollock on Shipping.

Mellish (*J. Broun* with him), for the respondent, was stopped by the court.

Sir J. COLERIDGE.—This case has been extremely well argued, and almost everything that could have been said in favor of the appellant has been brought before us by Mr. Macnamara. But after all this has been heard, including the evidence as to the custom of the port, it certainly is not difficult to come to a conclusion. Their lordships are of opinion that the judgment of the chief justice was founded on the right ground—the construction of the contract between the parties. The view taken by the chief justice was, that as the goods were to be discharged at the ship's side, their delivery was to entitle the master to his freight and to take from him his lien. In that view we concur. This being so, in both cases we must affirm the decision of the Supreme Court.

Judgment for the respondent.

DIGEST OF RECENT CASES.[1]

ACTION.

If, pending an action in court, the defendant dies, and commissioners of insolvency on his estate are appointed by the judgd of probate, and the claim in suit is, by the creditor, presentee to them and their adjudication upon it had, from which he appeals, he cannot prosecute his appeal by amending his writ in the action pending, but must commence a new suit, declaring for money had and received, as the statute provides.

Nor is the case altered, by the fact that the estate proves to be solvent.

The adjudication and report of the commissioners having been accepted by the Probate Court, will bar the plaintiff from recovering in such pending suit; and the administrator will have costs from the time of his appearance to defend.—*Bates* v. *Ward, Adm'x*, 49 Me. 87.

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[1] These abstracts have been taken from the reports of recent English cases in the different periodicals, mainly from the *Weekly Reporter*, an excellent and reliable journal of legal matters, from advance sheets of the official reports, kindly furnished us by the reporters of the various States in which the decisions were rendered, and from reliable legal journals in this country.

Administrator.

Payment of part of a debt after it is due, is not a sufficient consideration for a promise to give time to the principal debtor, so as to discharge his surety.

Notice to charge an endorser's estate, after his decease, and before the appointment of an administrator, may be addressed to the deceased at his last residence; but if sent to a brother at a distant place, it will be insufficient, though he is soon after appointed administrator.

Notice to an administrator, left at his boarding place, where he is staying for a few days, will be sufficient, if found to have reached him.

A claim against the estate of a deceased person, who was the endorser of a note not paid at maturity, may be set off against a claim for money had and received before his decease, though the note did not become payable, and notice of non-payment was not given, till after the decease.

It is not necessary to present a claim to the administrator of an insolvent estate, either for the purpose of an allowance by the commissioner, or to be set off against a suit of the administrator.—*Mathewson* v. *Strafford Bank*, N. H. Sup. Ct. Strafford Co.

Admiralty.

The District Court of the United States has no jurisdiction over a transport in the employment of the United States, to decree salvage, as she is exclusively owned by the sovereign power, and, therefore, not amenable to the judicial tribunals at the suit of private parties.—*Hargill* v. *The Thomas A. Scott*, (*In rem.*) U. Dist. Ct. N. Y. June, 1864.

Attachment.

Whether, where the by-laws of a corporation, authorized by the charter, require transfers of its stock to be made on the books of the company, a separate written assignment of stock conveys the legal title or only an equitable one. *Quære.*

Even if it conveys only an equitable title, yet this title is good in equity against an attachment afterwards made by a creditor of the vendor, where the assignment is made in good faith, and the parties have done what they could in the circumstances to perfect the title of the vendee.

Where stock of the vendor had been attached by a prior attaching creditor, and the secretary of the company refused,

on the application of the vendor, to allow a transfer on the books of the company of the stock so attached, and the vendor thereupon, in good faith, made a written assignment of the stock by a separate instrument, and lodged it with the secretary, it was held that the title of the vendee was good against later attachments of the stock by the creditors of the vendor.

The ground upon which stock sold but not legally transferred is open to attachment by the creditors of the vendor, is the same upon which personal chattels sold, but retained in the possession of the vendor, are liable to attachment as the property of the latter: and the same circumstances that would excuse the failure to take possession in the one case, will excuse the failure to perfect the transfer in the other.

An attaching creditor, by the present policy of our law, is regarded with less favor than formerly, when an attachment of a debtor's property was the only mode of compelling an appropriation of it to the payment of his debts. This is especially so in view of the fact that an attaching creditor gains a preference over other creditors, while the policy of our law, as expressed in our insolvent acts, favors an equal distribution of the effects of a debtor among his creditors.—*Elizabeth H. Colt* v. *Nathan B. Ives and others*, 31 Conn. 25.

Attempt.

A conviction for an attempt to commit a felony cannot be supported, unless it appears upon the evidence that the felony might have been completed if there had been no interruption.

If, therefore, upon an indictment for attempting to commit a felony, by putting the hand into a woman's pocket, with intent to steal her property therein, it appears that she had nothing in her pocket, a conviction cannot be sustained.—*Reg.* v. *Collins*, Crown Cas. Res. June 4, 1864.

Consideration.

A partial failure of consideration, though not a defence in an action on a promissory note at common law, except where the amount to be deducted is a mere matter of computation, is made by statute a good defence in all cases where a total failure would be a defence. This statute applies to causes of action existing at its passage, if the action is brought afterwards.—*Nichols* v. *Hunton*, N. H. Sup. Ct. Hillsborough.

Constitutional Law.

At the adoption of the Constitution, all governmental power was in the States; and in the division of it made by the adoption of the Constitution, the federal government received only what was granted to it, the States retaining the residuum, except so far as it was extinguished entirely by prohibitions upon the States.

The prohibition of a power to the States did not, of itself, operate as a grant of the power to the federal government, but rather as an extinguishment of the power as a governmental one where a grant of it was not made in the Constitution to the federal government.

The power to coin money is one power, and the power to declare anything a legal tender is another, and different power; both were possessed by the States severally at the adoption of the Constitution; by that adoption, the power to coin money was delegated to the federal government, while the power to declare a legal tender was not, but was retained by the States with a limitation, thus: "Congress shall have power to coin money," &c. "No State shall coin money;" and "no State shall make anything but gold and silver coin a legal tender," &c. States, then, though they cannot coin money, can declare that gold or silver coin, or both, whether coined by the federal, or the Spanish, or the Mexican government, shall be legal tender. And as Congress was authorized to make money only out of coin, and the States were forbidden to make anything but coin a legal tender, a specie currency was secured in both the federal and State governments. There was thus no need of delegating to Congress the power of declaring a legal tender in transactions within the domain of federal legislation. The money coined by it was the necessary medium.

The words delegating to Congress power "to coin money," regulate the value thereof, and "of foreign coin," do not include the right to make coined money out of paper. If they do, then the States have a right to make such money a legal tender. It does violence to the language to give it such a meaning.

The power to declare paper a legal tender is not incidental to any power delegated by the Constitution.—*Thayer* v. *Hedges and another*, 22 Ind. 282.

Corporations. (See Attachment.)

Distress.

A person distraining cattle damage feasant, must drive them to the pound in a reasonable time, considering the circumstances. What is a reasonable time, is to be determined by those who try the case.

To justify a distress of cattle damage feasant, it is not necessary to show that the land is enclosed, except as against an adjoining owner.

An application for the appointment of appraisers to appraise the damage done by cattle may be made after four days, without joining an application for the sale, or appraisal of the animal, which may be done afterward by a separate application.

The omission of appraisers to take the oath prescribed, before issuing notice of their sitting, may be waived by the appearance of the party without objecting, after notice of the omission.

If two only of the appraisers act, their report will be defective.

Mere delay of the party distraining to obtain an order of sale, does not make him a wrong-doer *ab initio*.

Trover lies for goods taken by a wrongful distress.

Under the general issue in trover, the defendant may show a taking of the animal in question as a distress damage feasant.—*Drew* v. *Spaulding*, N. H. Sup. Ct. Hillsborough Co.

Estoppel.

Certain notes payable to A were by him deposited with B, in pledge as security for his indebtedness to B. C, being desirous of collecting a claim of his own against A, made inquiries of B as to the notes; and B, without being informed of the purpose of the inquiry, replied that the notes belonged to A.—*Held*, that, without proof that B intended to deceive C to his injury, these facts do not operate as an *estoppel in pais*, to prevent B claiming money paid to him on the notes, notwithstanding the money was attached and seized by C at the time of payment.

In such a case, in order that B should be estopped from setting up a title to the money, it must be shown that he wilfully gave false information to C, with an intention to deceive him, and to induce him, on the faith of it, to act in a different manner than he otherwise would have done, whereby C was led so to change his action, and was thereby injured.—*Piper* v. *Gilmore*, 49 Me. 149.

Insurance.

The provision in the charter of an insurance company which limits a suit on the policy to the county where the company is located, pertains merely to the remedy, and may be changed by a general law upon the subject.

Where the declaration recited a policy made with S, C, M & B, under the name of S and others, and the policy offered in evidence was with S and others, without mentioning the names of C, M & B, and there was evidence tending to show that C, M & B were jointly interested with S in the property insured, and were the persons intended by the term "others," it was held that there was no variance.

Where, after an insurance was effected by "S and others," the property was sold to W, who at the same time mortgaged it back to S, to secure debts due to him and to C & M, of which notice was given to the company, who indorsed upon the policy a consent that it should remain in force and not be avoided by the sale, which consent was signed by the president and secretary;—*Held*, that the policy was not avoided by the sale, but that a suit might be maintained by S for the benefit of himself and C & M, and also that the president and secretary who had given such consent, at the company place of business, were to be presumed to have authority to do the act, until the contrary was shown.

Where the interest of the plaintiff was that of a mortgagee, it was *held*, that he was not limited to the recovery of two-thirds of the mortgage interest, by the stipulation that the recovery should not exceed two-thirds the value of the property, but was entitled to the whole sum insured, if it did not exceed his mortgage interest, nor two-thirds the actual value of the property.—*Sanders* v. *Hillsborough Ins. Co.*, 44 N. H. 238.

Notes and Bills.

Where a note is given by one, at the request of another, to a third person, in a suit between the payee and signer, it is not essential that there should be shown a consideration between the payee and him at whose request it was made.—*Peterborough and Shirley Railroad* v. *Chamberlin*, 44 N. H. 494.

Practice.

The court, in charging a jury, is not bound to follow the precise language or words of counsel; it is enough that the propositions of law are fairly laid down substantially as requested.

On short voyages, where extra spars and cordage can be easily carried, a carpenter need not be furnished a ship to render her seaworthy, so as to entitle her owners to recover against the underwriters in case of loss.—*Walsh* v. *Washington Marine Ins. Co.*, N. Y. Sup. Ct. General Term, April, 1864.

Where a receipt is given for goods attached, to which an aggregate value is affixed, the receipters are bound, on demand, to return *all* the articles attached.

If, in an officer's receipt for goods attached, the specific value of each article is affixed, and the receipter sells a part of them, he may, *it seems*, on demand made by the officer for the property attached, deliver the articles unsold, and, in lieu of those sold, the amount in money, at which they were valued in the receipt.

Where the sheriff having the execution, received and indorsed thereon, the proceeds of certain articles included in the receipt, at their agreed value, and took possession of the remainder, the receipters were held to be discharged.—*Bicknell* v. *Lewis et al.* 49 Me. 91.

Sale.

In a contract for the sale of goods, when the price, time and manner of payment, and time and manner of delivery, are agreed upon, delivery will, in the absence of all other facts, pass the title.

But when there is an express or implied agreement that the title is not to vest until payment or delivery of notes, a delivery will not pass the title, until the condition is performed.

When, by the terms of an agreement of sale, the article sold is to remain in the possession of the vendor, for a specific time, or for a specific purpose, as part of the consideration, and the sale is otherwise complete, the possession of the vendor will be considered the possession of the vendee, and the delivery will be sufficient to pass the title, even as against subsequent purchasers.

If one having possession of property of others for a specific purpose, sends it to third persons, who receive it and hold it as security for money advanced to the sender, such sending, receiving and holding is a conversion, both by him and them, and the owners may maintain trover without any demand.

Nor will it make any difference, that the persons receiving it acted ignorantly and in good faith.

A proposition made by the owners of property tortiously held by others, to acknowledge their title and hold it for them,

is not a waiver of the conversion, unless assented to by both parties.

In trover for the conversion of property, *by receiving it as a pledge for money advanced to a bailee*, evidence in defence that he could not send it to the place to which he had agreed to send it for manufacture, and therefore sent it to the defendants, is immaterial and inadmissible.

The petition of the plaintiffs to a court of insolvency in Massachusetts, setting forth that they hold certain notes against an insolvent debtor, and that they are the owners of certain property, which they hold as collateral security for the payment of those notes, and praying for leave to sell the property and to apply the proceeds towards the payment of the notes, and that they may be admitted to prove the balance of their claims against the insolvent, and the order of court giving them leave as prayed for, together with evidence of a sale to the plaintiffs at auction, are not a bar to an action of trover for a conversion of the property by the defendants, before these proceedings took place, the plaintiffs not claiming title under them.

The title of a mortgagee is sufficient to maintain trover against all persons not setting up any claim under the right to redeem.

When property is held as security for the payment of certain notes, the title to it is not changed so long as any of the notes remain unpaid.

Manufacturers cannot lawfully set up a lien for labor performed upon articles tortiously converted to their own use.—*Hotchkiss et. al.* v. *Hunt et al.* 49 Me. 213.

Ships and Shipping.

The master of a vessel, whether in a foreign or a home port, has a right to charge the owners with such expenses for repairs as their interests require that he should incur; unless the owners or their agent are either at the port or so near that communication can be had with them without injurious delay.

A master of a steam propeller, running regularly between New York and Boston, ordered in New York certain repairs of the engine, which had broken down on the trip from Boston, coming to $42. The vessel could not go to sea without the repairs, and it was necessary that they should be immediately made. A part of the owners lived in Philadelphia, a part in Hartford, Connecticut, and a part in Middlesex county, Connecticut. *Held*, that the master had authority to order the

repairs, and to bind the owners by his contract therefor, without consulting them.

The plaintiffs were a joint stock corporation, of which W and B owned an equal amount, and nearly the whole of the stock. W and B were also partners, and as such owned an interest in a vessel in which the plaintiffs had no interest. W was president of the corporation and B its treasurer, and they were together its managers. Certain of the part owners of the vessel, among whom were W and B, having contracted to sell their interests, found it necessary in doing so to provide for certain debts that were a lien on the vessel; and at a meeting of these part owners for the purpose, W and B agreed to pay the claim of the plaintiffs, as well as some other of the debts, some of the other part owners agreeing to pay certain other of the debts, and in a schedule of the debts in question W and B marked the debt due the plaintiffs as "paid." No further act was done by W and B in the way of payment, and there was no credit given or other balancing of the account on the books of the plaintiffs. The plaintiffs afterwards brought suit on the claim against all the then owners of the vessel. *Held*, that the law would not infer a payment of the debt from these facts.

Where the plaintiffs, in the presence of the auditors, admitted that a certain sum was to be credited to the defendants on the account upon which the suit was brought, and entered the credit on the bill of particulars filed in the case, it was held to be an admission which estopped them; and where the auditors neglected to allow the credit in making up the balance due the plaintiffs, it was held to be error.—*Woodruff & Beach Iron Works* v. *Stetson et al.*, 31 Conn. 51.

Torts.

The defendants kept a large number of horses, which were affected with glanders and other contagious diseases, in a stable adjoining that of the plaintiff. The two stables were so arranged that the heads of the horses in the respective stables were towards each other, and were separated only by a thin board partition, which the defendants' horses ate through.

There was a water tank in the street outside of the defendants' premises, at which their diseased horses were allowed to drink. The doors or gates were left open, and the horses were suffered to go out. This tank was also used for watering the plaintiff's horses.

Held, that the defendants were guilty of negligence in not

providing more carefully against the effects of contagion, and that the jury having found that the plaintiff was free from negligence, their verdict in his favor would not be disturbed.—*Mills* v. *New York and Harlem Railroad Co.*, N. Y. Super. Ct., Gen. Term, Apr. 1864.

The defendants removed a pauper from the town of East Haddam to Marlborough and left him there. He had no known settlement in the state, and Marlborough had to assume charge of him, and the defendants brought him there for the purpose of throwing the burden of his support upon that town. Marlborough brought a suit against them for damages, and recovered the amount expended in his support up to the time of trial. They then requested the defendants to remove the pauper, but they refused to do so. The pauper continued a charge upon the town, and Marlborough afterwards brought a second suit for the damages that had accrued since the former judgment, alleging the original bringing of the pauper into the town by the defendants, their leaving him there, and their refusal to remove him. *Held*, that the former recovery was a bar to the second action.

The case is not like that of a continuance of a nuisance. In that case the continuance of the nuisance is a constantly renewed cause of action. In the present case the whole injury was in contemplation of law done by the first act of bringing the pauper into the town.

Though there might be difficulty in ascertaining the exact damage which might result, inasmuch as it depended upon contingencies, yet is was no more difficult than in many other cases of future and consequential damage, which, resulting from one wrongful act, can be made the ground of but one action.

If a plaintiff recover compensation for part of a cause of action, it is a satisfaction for the whole.—*Marlborough* v. *Sisson et al.*, 31 Conn. 332.

Trade Marks.

Some goods having been imported with counterfeit trade marks, and the dock warrants transferred to U, as cash for an advance made by him in ignorance of the fraud,

Held, that subject to his causing the false trade marks to be removed, his lien was prior to the costs of the plaintiffs in a suit instituted to restrain the dock company from parting with the goods.—*Pousardin* v. *Peto*, Rolls' Court, Dec. 10, 1863.

Trover.

Judgment in trover for the full value of goods converted against one of two joint tort feasors, is, without execution or satisfaction, a bar to an action of trespass by the same plaintiffs against the other.—*Hunt et al.* v. *Bates*, 7 R. I. (4 Ames) 217.

Trustee Process.

Railroad iron, to the value of upwards of sixty thousand dollars, was purchased by S for the use of a railroad company, with their note, secured by their mortgage bonds for thirty thousand dollars and the personal guaranty of eight of the friends of the road, including S, to the amount of five thousand dollars each, and was by S loaned to the company to be laid down and used on their track; the title of the company to the iron to become complete when they had paid for the same; and in default of payment, S to have the right to take up the iron from the track of the road, and hold the same for the indemnity, amongst other things, of the guarantors. Under this contract S delivered the iron to the railroad company, and it was laid down on their railroad track in the Commonwealth of Massachusetts. Upon garnishee process served here upon S by the creditors of two of the guarantors, for the purpose of attaching the iron as in his hands, for their use, it was

Held, notwithstanding the company was in default to the injury of the defendants, that S was not chargeable as garnishee for the iron, because it was not in his possession, and because the defendants had no attachable interest in it.—*Clarke* v. *Farnum; Same* v. *Holbrook*, 7 R. I. (4 Ames) 177.

Wills.

Where a testator bequeathed to his widow the use of his personal property during her life and widowhood, she to use what may be necessary for her support and convenience, and after her decease or marriage, one-half of what remained to descend to his son A, and the other half to his son B, B to come into possession "when he shall arrive at the age of twenty-one years, or at the death or marriage" of the widow, the legacy to B is contingent, and he having died a minor, and before the widow died or married, it lapses and is void.

It seems that where the bequest is absolute in its terms, but *to be paid* at a future time, it vests in the legatee, and is trans-

missible to his representatives if he dies before the time fixed for payment; but when the bequest is *to take effect* at a future time, or the time is annexed to the *legacy* itself, and not to the *payment* of it, it is contingent, and lapses by the death of the legatee before the time.

When a minor had been for some years at work on his own account, and died leaving no widow, issue, or father surviving, his administrator may maintain an action for money had and received against one who has collected his wages; and it is no defence that such person acted as agent for the mother of the minor, and paid what he collected to her, and that she distributed it amongst some of the minor's heirs.—*Snow, Adm'r.*, v. *Snow*, 49 Me. 159.

Where a testator devised certain lands, subject to a life estate in his daughter Zilpha, to his great-grandson, Gorton Arnold, "to be to him, his heirs, and assigns forever, if the said Gorton should live to have lawful issue; but if he die without lawful issue, then the whole of said premises shall descend to and be held by my great-grandson, Benjamin Arnold, brother of Gorton, his heirs and assigns forever," it was

Held, that Gorton Arnold took an estate tail in the lands.—*Arnold* v. *Brown*, 7 R. I. (4 Ames) 188.

A devise to a grandson, of certain real estate, "for and during the term of his natural life," and after the termination of the life estate, "to the lawful issue of the grandson," "to be and remain to such issue, in equal portions, and to their heirs and assigns forever; but if my said grandson, E. W., shall die leaving no lawful issue," then over to other grandsons, in equal portions, and to their heirs and assigns forever, does not create an estate tail in the grandson, E. W., under the rule in Shelley's case; but, by the express terms of the statute of wills of Rhode Island, an estate for life only, and the remainder vests in his children in fee simple.

The liability of the life estate, in such case, to forfeiture, for the nonpayment of an annuity charged upon it, though the liability exist before the birth of issue to the life tenant, does not destroy the life estate, so as to cause the remainder to the issue to fail for want of an estate of freehold to support it; but in order to the destruction of the life estate, there must be an entry for condition broken, or claim, by the heirs, for the purpose of avoiding it; and where the charge is upon the life estate only, the remainder vests in the children as they are born, unencumbered by the arrears of the annuity.—*Williams, Guardian*, v. *Angell*, 7 R. I. (4 Ames) 145.